

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911-1912-1913

No. ~~892~~ 445 140

THE BAER BROTHERS MERCANTILE COMPANY,
PLAINTIFF IN ERROR,

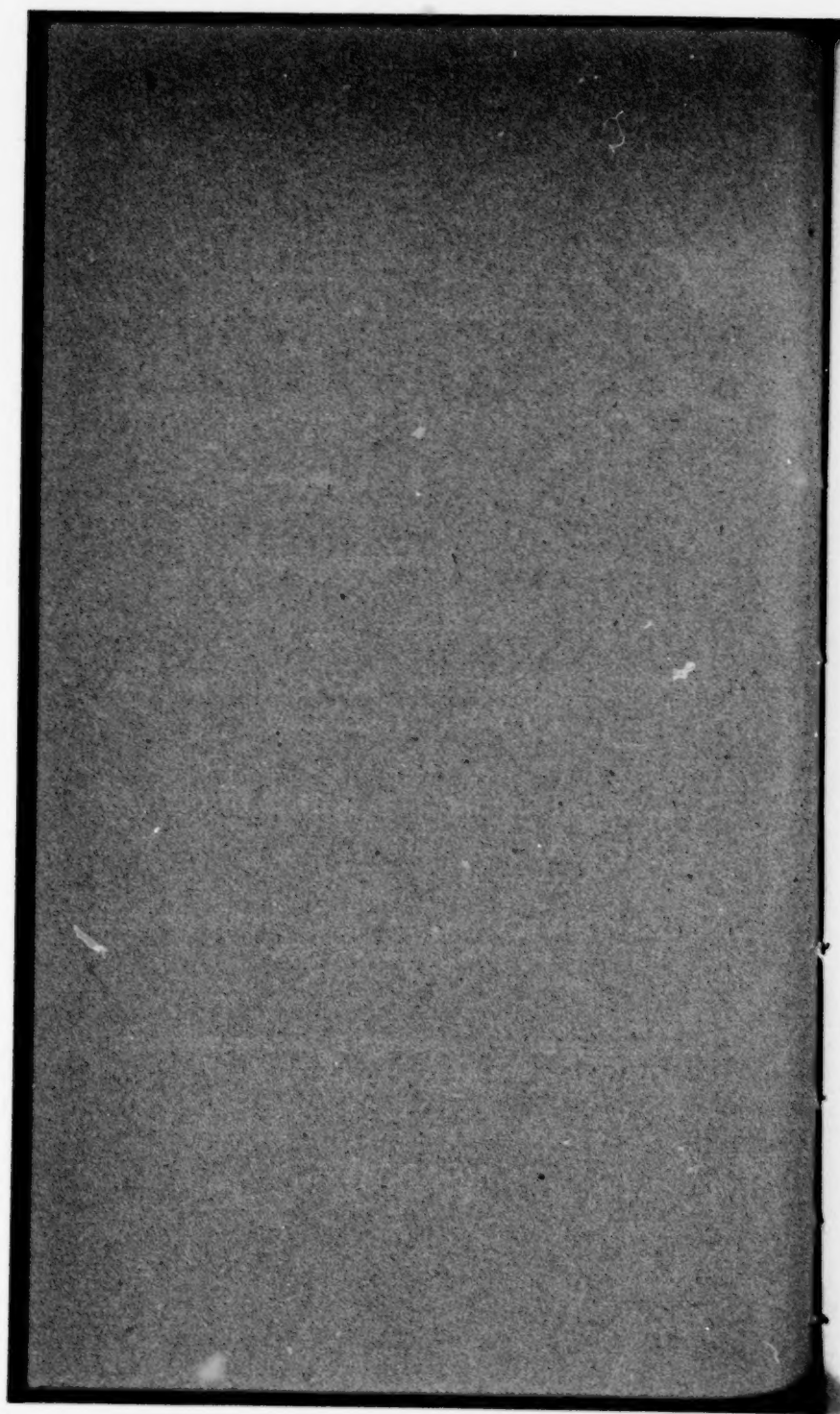
vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 18, 1911.

(22,969)



(22,969)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 893.

THE BAER BROTHERS MERCANTILE COMPANY,
PLAINTIFF IN ERROR,

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1911, of said Court, Before the Honorable Walter H. Sanborn and the Honorable Willis Van Devanter, Circuit Judges, and the Honorable William H. Munger, District Judge.

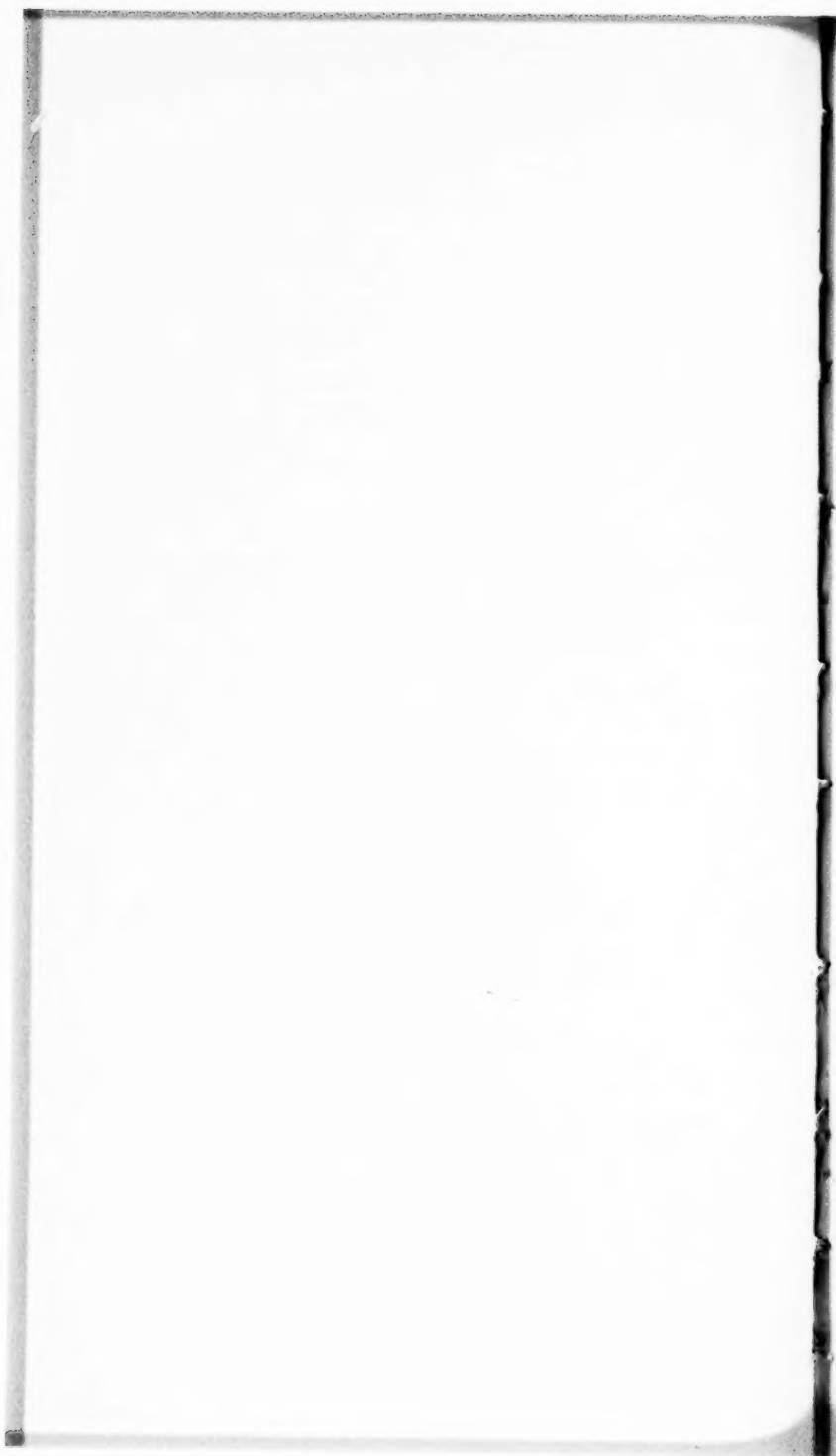
Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the twenty-eighth day of January, A. D. 1909, a transcript of record pursuant to a writ of error directed to the Circuit Court of the United States for the District of Colorado, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Denver and Rio Grande Railroad Company is Plaintiff in Error and The Baer Brothers Mercantile Company is Defendant in Error, which said transcript of record as printed pursuant to the designation of Plaintiff in Error for use of the Court upon the hearing of said cause, is in the words and figures following, to-wit:

(a)



a In the United States Circuit Court of Appeals for
 the Eighth Judicial Circuit.

The Denver and Rio Grande Railroad Company, Plaintiff
 in Error

vs.

The Baer Brothers Mercantile Company, Defendant
 in Error.

Notice with regard to printing record.

To the above named Defendant in Error, The Baer Brothers
Mercantile Company, and William B. Harrison, its At-
torney of Record:—

In accordance with Rule 23, of the United States Circuit
Court of Appeals for the Eighth Circuit, The Denver and Rio
Grande Railroad Company, Plaintiff in Error in the above en-
titled cause, by its attorneys, hereby advises you that it thinks
all of the record in said cause necessary for the consideration
of the errors assigned, except that it does not consider it nec-
essary for more than the first two documents of each of its Ex-
hibits numbers One, Two, Three and Four, to be printed. Each
of said Exhibits consists of seventy-six or more printed forms,
the first form in each of said Exhibits having reference to
the first shipment involved in said cause, the freight on which
was paid at Leadville, Colorado, and the remaining forms hav-
ing reference to the remaining seventy-five shipments, the
freight on which was paid at St. Louis. It therefore appears
necessary to have printed only the first and second forms, con-
tained in each of said Exhibits followed by a statement that ex-
cept as to date, weight and charges, the remaining forms in
each of the Exhibits mentioned are substantially iden-
b tical with the second form in each of said Exhibits, the
 dates, weights, and amount of charges being as set forth
in the petition.

If the foregoing meets with your approval you will kindly
signify the same by subscribing your approval below.

THE DENVER AND RIO GRANDE
RAILROAD COMPANY,

Plaintiff in Error,

By E. N. Clark and T. L. Philips,

Its Attorneys.

Approved :

**THE BAER BROTHERS MERCANTILE
COMPANY,**

Defendant in Error,

By Wm. B. Harrison, Its Attorney.

(P-N-12-30-08)

No. 2997. U. S. Circuit Court of Appeals for 8th Circuit
The Denver and Rio Grande Railroad Company, Plaintiff in
Error, vs. The Baer Bros. Mercantile Company, Defendant in
Error. Designation of Plaintiff in Error with regard to print-
ing record. Filed Jan. 28, 1909. John D. Jordan,
Clerk.

- 1 Pleas in the Circuit Court of the United States
for the District of Colorado Sitting at Denver.

Be It Remembered, that heretofore, and on, to-wit, the
twenty-sixth day of June A. D. 1908, came The Baer Brothers
Mercantile Company by William B. Harrison, Esquire, its at-
torney, and filed in said court its petition for enforcement &c.;
and sued out of and under the seal of said court a writ of
summons against The Denver and Rio Grande Railroad Com-
pany.

And the said petition is in words and figures as follows, to-
wit :

In the Circuit Court of the United States for the District
of Colorado.

The Baer Brothers Mercantile Company,
Petitioner,

No. vs. At Law.

The Denver and Rio Grande Railroad Company, Defendant.

Petition for the Enforcement of an Order of The Interstate
Commerce Commission for the Payment of Money.

- 2 The above named Petitioner, by Wm. B. Harrison, its
Attorney, complains of the above named defendant and
alleges :

That the Interstate Commerce Commission was created and
established and now exists under and by virtue of an Act of
Congress entitled "An Act to Regulate Commerce," Approved
February 4, 1887 and the amendments thereto enacted by Con-
gress.

That said petitioner the Baer Brothers Mercantile Company,
is a corporation created and existing under and by vir-

tue of the laws of the State of Colorado, having its principal place of business at Leadville in said State.

That the said defendant, The Denver & Rio Grande Railroad Company, is a corporation created and existing under and by virtue of the laws of the State of Colorado, having its principal office at Denver in the said State of Colorado; and that the said defendant and the Missouri Pacific Railway Company were, at the time of the committing of the grievances herein-after specially mentioned, and still are, common carriers engaged in the transportation of persons and property by their several lines of railroad, under a common control management or arrangement for continuous carriage or shipment from St. Louis in the State of Missouri, to Leadville in the State of Colorado, and as such common carriers were, during all the time aforesaid and still are, subject to the provisions of the said act entitled "An Act to Regulate Commerce," and the amendments thereto.

That the said defendant, The Denver & Rio Grande Railroad Company, and the said The Missouri Pacific Railway Company, were heretofore, to-wit: on the 6th day of May 1907, duly impleaded before the said Interstate Commerce Commission upon the petition of the said The Baer Brothers Mercantile Company, the petitioner herein, for the alleged violation on the part of said carriers of the provisions of said act entitled "An Act to Regulate Commerce," and the amendments thereto, to the alleged damage of said petitioner in the sum of Seven Thousand Two hundred and Ninety-nine Dollars and Twenty-seven Cents (\$7,299.27), and in and by said petition the said petitioner prayed that an order be made by said Commission requiring the said carriers, jointly or severally, as might be found just and proper, to pay to the said petitioner the said sum of Seven Thousand Two Hundred and Ninety-nine dollars and Twenty-seven Cents (\$7,299.27), as reparation for the damages sustained by said petitioner in consequence of the violation of the provisions of said act as aforesaid, as at large and more fully appears by the said petition on file in the office of said Commission, which said petition is made a part of this petition, the same being in the words and figures following, to-wit:

4 Before the Interstate Commerce Commission.

The Baer Brothers Mercantile Company, Complainant
vs

The Missouri Pacific Railway Company and
The Denver and Rio Grande Railroad Company, Defendants.

The petition of the above named complainant respectfully shows:

I. That on to-wit, the 12th day of July, A. D. 1902, the above named complainant was and ever since has been and is now, a corporation, organized and existing under and by virtue of the laws of the State of Colorado, and was at the time aforesaid and ever since has been and is now engaged in the business of importers and jobbers of beer and other liquors at the City of Leadville, in the State of Colorado.

II. That on to-wit, the 12th day of July, A. D. 1902, the above named defendant, The Missouri Pacific Railway Company was and ever since has been and is now a corporation and common carrier, engaged in the transportation of persons and property wholly by railroad, from the city of St. Louis, in the State of Missouri, to the city of Pueblo, in the State of Colorado, and that the above named defendant The Denver & Rio Grande Railroad Company was at the time aforesaid and ever since has been and is now, a corporation and common carrier engaged in the transportation of persons and property wholly by railroad from the said city of Pueblo, via the said city of Leadville, to the city of Grand Junction, in the state of Colorado, and complainant avers that the Rio Grande Western Railway Company was at the time aforesaid and ever since has been and is now, a corporation and common carrier engaged in the transportation of persons and property wholly by railroad from said city of Grand Junction to Salt Lake City, in the State of Utah.

III. That the defendants above named and the said Rio Grande Western Railway Company were on said 12th day of July, 1902, and ever since have been common carriers, and under a common control, management or arrangement for continuous carriage or shipment, were on
5 said date and ever since have been and are now, engaged in the transportation of beer in carload lots and other property wholly by their said railroads from the city of St. Louis in the state of Missouri, via Leadville, Colorado, and Grand Junction, Colorado, to Salt Lake City, in the state of Utah, and as such common carriers the said defendants were on said date and ever since have been and now are subject to the provisions of the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and the amendments thereto enacted by Congress.

IV. That on the said 12th day of July, 1902, the defendants above named were and ever since have been and are

now, common carriers, and under a common control, management or arrangement for continuous carriage or shipment, were on said date and ever since have been and are now, engaged in the transportation of beer in carload lots and other property wholly by their said railroads from the city of St. Louis, in the state of Missouri, to the city of Leadville, in the state of Colorado, and as such common carriers were on said date and ever since have been and are now subject to the provisions of the Act of Congress entitled "An Act to Regulate Commerce," approved February 1, 1907, and the amendments thereto enacted by Congress.

V. That on the said 12th day of July, 1902, the defendants above named and said Rio Grande Western Railway Company had established and published a joint tariff of rates or charges for the transportation of beer in carloads over their said lines of railroad from the said city of St. Louis, to said Salt Lake City and that the rate or charge so established and published was 70 cents for each hundred pounds of beer in gross transported as aforesaid, which rate or charge has ever since said date, been and is now in force.

VI. That at the times hereinafter mentioned The William J. Lemp Brewing Company of said city of St. Louis, at the request of complainant, delivered to the said Missouri Pacific Railway Company at said city of St. Louis, certain beer in half barrels, quarter barrels and other packages in carload lots, belonging to the complainant, to be carried over defendants' said lines of railroad to the said city of Leadville, and at said city of Leadville to be delivered to the complainant. That the gross weight of each carload lot of beer so delivered and the date of delivery of the same to the said Missouri Pacific Railway Company as aforesaid was as follows, to-wit:

1	July	12, 1902,	delivered	30690	pounds
2	July	28, 1902,	delivered	31545	pounds
3	August	12, 1902,	delivered	30348	pounds
4	August	22, 1902,	delivered	30170	pounds
5	September	9, 1902,	delivered	30225	pounds
6	September	20, 1902,	delivered	30036	pounds
7	October	13, 1902,	delivered	30060	pounds
8	November	5, 1902,	delivered	30060	pounds
9	December	6, 1902,	delivered	30060	pounds
10	December	27, 1902,	delivered	30036	pounds
11	January	26, 1903,	delivered	30036	pounds
12	February	25, 1903,	delivered	30000	pounds
13	April	1, 1903,	delivered	30105	pounds
14	May	4, 1903,	delivered	30030	pounds
15	May	25, 1903,	delivered	30195	pounds

16	June	16, 1903,	delivered	30175	pounds
17	June	30, 1903,	delivered	30130	pounds
18	July	29, 1903,	delivered	30145	pounds
19	August	3, 1903,	delivered	30300	pounds
20	August	17, 1903,	delivered	30141	pounds
21	September	12, 1903,	delivered	30045	pounds
22	October	10, 1903,	delivered	30060	pounds
23	November	4, 1903,	delivered	30363	pounds
24	December	7, 1903,	delivered	30090	pounds
25	January	13, 1904,	delivered	30045	pounds
26	February	20, 1904,	delivered	30080	pounds

27	March	22, 1904	delivered	30030	pounds
28	April	18, 1904,	delivered	30045	pounds
29	May	13, 1904,	delivered	30063	pounds
30	June	7, 1904,	delivered	30295	pounds
31	June	30, 1904,	delivered	30280	pounds
32	July	22, 1904,	delivered	30045	pounds
33	August	15, 1904,	delivered	30095	pounds
34	September	7, 1904,	delivered	30154	pounds
35	September	27, 1904,	delivered	30156	pounds
36	October	24, 1904,	delivered	30000	pounds
37	November	21, 1904,	delivered	30080	pounds
38	December	19, 1904	delivered	30765	pounds
39	January	21, 1905,	delivered	30080	pounds
40	February	18, 1905,	delivered	30112	pounds
41	March	15, 1905,	delivered	30012	pounds
42	April	10, 1905,	delivered	30180	pounds
43	May	3, 1905,	delivered	30130	pounds
44	May	22, 1905,	delivered	30130	pounds
45	June	7th, 1905,	delivered	30004	pounds
46	June	26, 1905,	delivered	30045	pounds
47	July	8, 1905,	delivered	30250	pounds
48	July	24, 1905,	delivered	30010	pounds
49	August	11, 1905	delivered	30042	pounds
50	August	29, 1905,	delivered	30010	pounds
51	September	19, 1905,	delivered	30040	pounds
52	October	9, 1905,	delivered	30110	pounds
53	November	6, 1905,	delivered	30400	pounds
54	December	2, 1905,	delivered	30024	pounds
55	December	26, 1905,	delivered	30018	pounds
56	January	24, 1906,	delivered	30030	pounds
57	February	17, 1906,	delivered	30240	pounds
58	March	12, 1906,	delivered	30040	pounds
59	April	2, 1905,	delivered	30156	pounds
60	April	19, 1906,	delivered	30048	pounds
61	May	8, 1906,	delivered	30060	pounds

8

62	May	14, 1906,	delivered 30098 pounds
63	June	8, 1906,	delivered 30060 pounds
64	June	21, 1906,	delivered 30140 pounds
65	June	29, 1906,	delivered 30035 pounds
66	July	21, 1906,	delivered 30040 pounds
67	July	31, 1906,	delivered 30180 pounds
68	August	18, 1906,	delivered 30048 pounds
69	September	6, 1906,	delivered 30042 pounds
70	October	1, 1906,	delivered 30040 pounds
71	October	22, 1906,	delivered 32536 pounds
72	November	17, 1906,	delivered 30020 pounds
73	December	10, 1906,	delivered 30040 pounds
74	January	18, 1907,	delivered 30000 pounds
75	February	13, 1907,	delivered 30040 pounds
76	March	16, 1907,	delivered 30112 pounds

That the said Missouri Pacific Railway Company Received and accepted each and every carload of beer delivered to it as aforesaid and transported the same over its said road to the city of Pueblo in the state of Colorado, on through bills of lading from St. Louis, Missouri, to Leadville, Colorado, and at the said City of Pueblo delivered said cars of beer and each of them to the said Denver & Rio Grande Railroad Company and said cars of beer were and each of them was received and carried by said The Denver & Rio Grande Railroad Company over its said railroad on said through bills of lading from said city of Pueblo to said city of Leadville, and at said city of Leadville said cars of beer and each of them was delivered by the said Denver & Rio Grande Railroad Company to the complainant.

VII. That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of said carload lot of beer delivered to it on the 12th day of July, 1902, as above stated, the said Missouri Pacific Railway Company charged 95 cents for each hundred pounds of beer in gross contained in said carload lot, and upon the arrival of the same at Leadville,

9 Colorado, the said Denver & Rio Grande Railroad Company demanded from the complainant and the complainant paid to the said Denver and Rio Grande Railroad Company, under protest, said rate or charge of 95 cents for each hundred pounds of beer in gross contained in said shipment.

That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of each of said carload lots of beer delivered to it after the 12th day of July, 1902, and prior to the 13th day of May, 1904, as above stated, the said Missouri

Pacific Railway Company charged and demanded from the said The William J. Lemp Brewing Company 95 cents for each hundred pounds of beer in gross contained in each of said carload lots and the said The William J. Lemp Brewing Company at the request of the complainant prepaid to the said Missouri Pacific Railway Company at its office in said city of St. Louis, under protest, the said rate or charge of 95 cents for each hundred pounds of beer in gross contained in each of said carload lots delivered after the 12th day of July, 1902, and prior to the 13th day of May, 1904, as aforesaid.

That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of each of said carload lots of beer delivered to it on and after the 13th day of May, 1904, as above stated, the said Missouri Pacific Railway Company charged and demanded from the said William J. Lemp Brewing Company 90 cents for each hundred pounds of beer in gross contained in each of said carload lots and the said William J. Lemp Brewing Company, at the request of complainant prepaid to the said Missouri Pacific Railway Company at its office in said city of St. Louis, under protest, the said rate or charge of 90 cents for each hundred pounds of beer in gross contained in each of said carload lots delivered on and after the 13th day of May, 1904, as aforesaid.

That the money advanced by the said The William J. Lemp Brewing Company to pay the transportation [charged] demanded as aforesaid, was in each and every instance repaid by complainant to the said William J. Lemp Brewing Company.

And complainant avers that without the payment of said charges or the payment of like charges, it was not possible for the complainant to have said beer transported from said
10 city of St. Louis to said city of Leadville at all.

And complainant avers that the rate or charge demanded and paid for the transportation by said defendants of each of said carloads of beer over their said lines of railroad from said city of St. Louis, to said city of Leadville, as aforesaid, was a through rate and a single charge for the whole of said service and that the rate or charge so made and collected for each of said shipments of beer was subsequently divided by said defendants between themselves.

That the distance from the said city of St. Louis to the said city of Leadville over the defendants said lines of transportation is one thousand and eighty (1080) miles, and the distance from the said city of St. Louis, to said Salt Lake City over the said lines of transportation of said defendants and the said Rio Grande Western Railway Company is one thousand

five hundred and forty-five (1545) miles; and complainant avers that the transportation of beer in carload lots over said lines of railroad from said city of St. Louis to said city of Leadville and to said Salt Lake City respectively, was on said 12th day of July, 1902, and ever since has been under substantially similar circumstances and conditions and was over the same line in the same direction, the shorter being included within the longer distance.

That the said rates or charges demanded by the defendants and paid by the complainant for the transportation of said beer from the said city of St. Louis, to the said city of Leadville as aforesaid, were and each of said rates and charges was unjust and unreasonable, and that any rate or charge in excess of 60 cents for each hundred pounds of beer so transported was unreasonable and unjust and that the rates or charges so demanded and paid were and each of them was a greater compensation in the aggregate, for the transportation of said beer under substantially similar circumstances and conditions for the shorter distance to Leadville, Colorado, than for the longer distance to Salt Lake City, Utah, over the same line in the same direction, the shorter being included in the longer distance, contrary to and in violation of the provisions

of said Act of Congress, entitled "An Act to Regulate 11 Commerce," approved February 4, 1887, and the amendments thereto enacted by Congress, and more particularly Sections 1 and 4 thereof; and complainant avers that in consequence of said violations of the provisions of said Act to Regulate Commerce and amendments thereto, the complainant has been damaged in the sum of Seven Thousand, Two Hundred and Ninety-nine Dollars and Twenty-seven Cents (\$7,299.27) no part of which has been paid.

Wherefore complainant prays that said defendants and each of them be required to promptly answer the charges herein; that after due hearing and investigation an order be made requiring said defendants and each of them to wholly cease and desist from said violations of said Act to Regulate Commerce, as amended, and to comply with the same to the full extent thereof; that a further order be entered, fixing a reasonable and just rate for the through transportation of beer in carload lots from said city of St. Louis, to said city of Leadville, over said defendants said lines of railroad, to be observed by said defendants as a maximum rate for such through transportation; that a further order be entered requiring the defendants jointly and severally as may be found just and proper, to pay to the complainant the sum of Seven Thousand, Two Hundred and Ninety-nine Dollars and Twenty-seven Cents (\$7,299.27) as a reparation for the damages sustained by com-

plainant in consequence of the violations of the provisions of said Act to Regulate Commerce, as amended, and that such other and further order or orders may be entered as the Commission may deem necessary in the premises and the complainant's cause may appear to require.

THE BAER BROTHERS MERCANTILE COMPANY,

By Adolph Baer,
Its President.

Dated at Denver, Colorado, April 30, A. D. 1907.

Wm. B. Harrison, Attorney for the Complainant,
408 Quincy Building, Denver, Colorado.

State of Colorado,

City and County of Denver—ss.

Adolph Baer, being first duly sworn, says that he is the
12 President of the above named complainant Company,
and that the matters set forth in the foregoing petition
are true as he verily believes.

ADOLPH BAER.

Subscribed and sworn to before me this 30 day of April, 1907.
My commission expires October 11, 1910.

DWIGHT L. PARKER,
Notary Public.

(Seal)

That thereafter the said defendant The Denver & Rio Grande Railroad Company and the said The Missouri Pacific Railway Company filed their separate answers to the said petition above set forth, as at large and more fully appears in and by said answers on file in the office of said Commission.

That thereafter the said cause being at issue upon the pleadings aforesaid, the said cause duly came on for investigation and hearing before the said Interstate Commerce Commission duly and legally assembled for that purpose, when the said petitioner, The Baer Brothers Mercantile Company, as well as the said defendant, The Denver & Rio Grande Railroad Company, and the said Missouri Pacific Railway Company duly appeared by their respective officers and attorneys, and thereupon the said cause proceeded to hearing and determination.

That at said hearing it was made to appear to the satisfaction of the said Commission that the said carriers, and particularly the said defendant The Denver & Rio Grande Railroad Company, had violated the provisions of said Act
13 entitled "An Act to Regulate Commerce," in certain re-

spects, as was stated to have been violated by them in the said petition hereinbefore set forth as a part hereof, to the damage of said petitioner in the sum of Three Thousand Four Hundred and Thirty-eight Dollars and Twenty-seven Cents (\$3,438.27), and that the said damages ought to be paid to petitioner by the said defendant The Denver & Rio Grande Railroad Company; and thereupon, on the 6th day of April 1908, the said Commission duly and legally determined the matters and things in controversy and at issue between the said parties, and made a report in writing in respect thereto, which included a statement of the conclusions of the said Commission, together with its decision awarding said damages to said petitioner, and the findings of fact on which said conclusions and award were based and made, as at large and more fully appears in and by said report duly entered of record and on file in the office of said Commission.

That thereafter and forthwith upon the determination of said cause as aforesaid, the said Commission duly formulated an order based upon the findings and determination of the said Commission with respect to the matters and things stated and charged in the said petition, agreeably to the requirements of the statute in such case made and provided, which said order now remains in full force and effect, never having been vacated, set aside, altered, modified or changed in any respect whatever, and is now on file in the office of the said Commission, the same being in the words and figures following, to-wit:

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of April, A. D. 1908.

Present:

Martin A. Knapp	(
Judson C. Clements)	
Charles A. Prouty	(
Francis M. Cockrell)	Commissioners
Franklin K. Lane	(
Edgar E. Clark)	
James S. Harlan	(

Baer Brothers Mercantile Company,
No. 1060. vs.

Missouri Pacific Railway Company and Denver & Rio Grande
Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and

full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is Ordered, That the defendant, the Denver & Rio Grande Railroad Company, be, and it is hereby, notified and required to pay unto the Complainant, the Baer Brothers Mercantile Company, of Leadville, Colo., on or before the 1st day of June, 1908, the sum of \$3,438.27, with interest thereon at the rate of 6 per cent per annum from May 6, 1907, as reparation for excessive and unreasonable charge for the transportation of 2,292,178 pounds of beer from Pueblo, Colo., to Leadville, Colo., as part of a through transportation from St. Louis, Mo., to said Leadville, as more fully and at large appears in the report of the Commission in this case.

That thereafter, to-wit, on the 13th day of April 1908, the said Commission, agreeably to the provisions of the law in that regard, duly caused a properly authenticated copy of its said report, together with the order aforesaid, to be delivered to the said petitioner and to the said defendant The Denver & Rio Grande Railroad Company.

And said petitioner avers that the said defendant The Denver & Rio Grande Railroad Company did not comply with said order within the time limit named in said order, but on the contrary, from the time of the issuance and service of the said order as aforesaid, the said defendant has wholly neglected and refused, and still neglects and refuses to comply with the said order.

Wherefore the said petitioner demands judgment against the said defendant The Denver & Rio Grande Railroad Company, for the sum of Three Thousand Four Hundred and Thirty eight Dollars and Twenty-seven Cents (\$3,438.27), together with interest thereon at the rate of six per cent per annum from May 6, 1907, and for a reasonable attorneys fee to be taxed and collected as a part of the costs of this suit.

WM. B. HARRISON,
Attorney for Petitioner.

State of Utah,
County of Salt Lake—ss.

16 Adolph Baer being first duly sworn says that he is the President of The Baer Brothers Mercantile Company, the above named petitioner, and that the matters set forth in the foregoing petition are true as he verily believes.

ADOLPH BAER.

Subscribed and sworn to before me this 22nd day of June 1908.

My Commission expires November 21st, 1909.

(Notary Seal)

WM. H. LESLIE,
Notary Public.

Endorsed: 5180. U. S. Circuit Court, District of Colorado. The Baer Bros. Mercantile Co. vs. The Denver & Rio Grande R. R. Company. Petition. Filed June 26, 1908. Charles W. Bishop, Clerk.

In the Circuit Court of the United States for the District of Colorado.

The Baer Bros. Mercantile Company, Petitioner,
No. 5180. vs.
The Denver and Rio Grande Railroad Company, Defendant.

Motion.

Defendant's Motion to Strike Portions of the Petition.

Comes now The Denver and Rio Grande Railroad Company, defendant in the above entitled cause, and prays the Court to make and enter of record herein, an order striking out 17 certain portions of the petition, as hereinafter more specifically set forth, for the reason that said portions thereof are irrelevant, redundant, immaterial and insufficient.

First. All that portion of said petition beginning in the 27th line of page two thereof and ending with the 8th line of page twelve thereof, in words and figures as follows, to-wit: as at large and more fully appears by the said petition on file in the office of said Commission, which said petition is made a part of this petition, the same being in the words and figures following, to-wit:

Before the Interstate Commerce Commission.

The Baer Brothers Mercantile Company, Complainant,
vs.
The Missouri Pacific Railway Company and The Denver and Rio Grande Railroad Company, Defendants.

The petition of the above named complainant respectfully shows:

1. That on to-wit, the 12th day of July, A. D. 1902, the above named complainant was and ever since has been and is now, a corporation, organized and existing under and by virtue

of the laws of the state of Colorado, and was at the time aforesaid and ever since has been and is now engaged in the business of importers and jobbers of beer and other liquors at the city of Leadville, in the state of Colorado.

II. That on to-wit, the 12th day of July, A. D. 1902, the above named defendant, The Missouri Pacific Railway Company, was and ever since has been and is now a corporation and common carrier engaged in the transportation of persons and property wholly by railroad, in the City of St. Louis, in the state of Missouri, to the City of Pueblo, in the state

18 of Colorado, and that the above named defendant, the Denver and Rio Grande Railroad Company, was at the time aforesaid, and ever since has been and is now, a corporation and common carrier engaged in the transportation of persons and property wholly by railroad from the said city of Pueblo, via the said city of Leadville, to the city of Grand Junction, in the state of Colorado, and complainant avers that The Rio Grande Western Railway Company was at the time aforesaid and ever since has been and is now, a corporation and common carrier engaged in the transportation of persons and property wholly by railroad from said city of Grand Junction to Salt Lake City, in the state of Utah.

III. That the defendants above named and the said Rio Grande Western Railway Company were on said 12th day of July, 1902, and ever since have been common carriers, and under a common control, management or arrangement for continuous carriage or shipment, were on said date and ever since have been and are now, engaged in the transportation of beer in carload lots and other property wholly by their said railroads from the city of St. Louis in the state of Missouri, via Leadville, Colorado, and Grand Junction, Colorado, to Salt Lake City, in the state of Utah, and as such common carriers the said defendants were on said date, and ever since have been and now are subject to the provisions of the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and the amendments thereto enacted by Congress.

IV. That on the said 12th day of July, 1902, the defendants above named were and ever since have been and are now, common carriers, and under a common control, management or arrangement for continuous carriage or shipment, were on said date and ever since have been and are now, engaged in the transportation of beer in carload lots and other property, wholly by their said railroads from the city of St. Louis, in the State of Missouri, to the City of Leadville, in the state

of Colorado, and as such common carriers were on said date and ever since have been and are now subject to the provisions of the Act of Congress entitled "An Act to Regulate Commerce," approved February 1, 1907, and the amendments thereto enacted by Congress.

V. That on the said 12th day of July, 1902, the defendants above named and said Rio Grande Western Railway Company had established and published a joint tariff of rates or charges for the transportation of beer in carloads over their said lines of railroad from the said city of St. Louis, to said Salt Lake City and that the rate or charge so established and published was 70 cents for each hundred pounds of beer in gross transported as aforesaid, which rate or charge has ever since said date, been and is now in force.

VI. That at the times hereinafter mentioned The William J. Lemp Brewing Company of said city of St. Louis, at the request of complainant, delivered to the said Missouri Pacific Railway Company at said city of St. Louis, certain beer in half barrels, quarter barrels, and other packages, in carload lots, belonging to the complainant, to be carried over defendants' said lines of railroad to the said city of Leadville, and at said city of Leadville to be delivered to the complainant. That the gross weight of each carload lot of beer so delivered and the date of delivery of the same to the said Missouri Pacific Railway Company as aforesaid, was as follows, to-wit:

1	July	12, 1902,	delivered 30090 pounds
2	July	28, 1902,	delivered 31545 pounds
3	August	12, 1902,	delivered 30348 pounds
4	August	22, 1902,	delivered 30170 pounds
5	September	9, 1902,	delivered 30225 pounds
6	September	20, 1902,	delivered 30036 pounds
7	October	13, 1902,	delivered 30060 pounds
8	November	5, 1902,	delivered 30060 pounds
9	December	6, 1902,	delivered 30060 pounds
10	December	27, 1902,	delivered 30036 pounds

20

11	January	26, 1903,	delivered 30036 pounds
12	February	25, 1903,	delivered 30000 pounds
13	April	1, 1903,	delivered 30105 pounds
14	May	4, 1903,	delivered 30030 pounds
15	May	25, 1903,	delivered 30195 pounds
16	June	16, 1903,	delivered 30175 pounds
17	June	30, 1903,	delivered 30130 pounds
18	July	29, 1903,	delivered 30145 pounds
19	August	3, 1903,	delivered 30300 pounds
20	August	17, 1903,	delivered 30141 pounds
21	September	12, 1903,	delivered 30045 pounds

22	October	10, 1903,	delivered	30060	pounds
23	November	4, 1903,	delivered	30363	pounds
24	December	7, 1903,	delivered	30090	pounds
25	January	13, 1904,	delivered	30045	pounds
26	February	20, 1904,	delivered	30080	pounds
27	March	22, 1904	delivered	30030	pounds
28	April	18, 1904,	delivered	30045	pounds
29	May	13, 1904,	delivered	30063	pounds
30	June	7, 1904,	delivered	30295	pounds
31	June	30, 1904,	delivered	30280	pounds
32	July	22, 1904,	delivered	30045	pounds
33	August	15, 1904,	delivered	30095	pounds
34	September	7, 1904,	delivered	30154	pounds
35	September	27, 1904,	delivered	30156	pounds
36	October	24, 1904,	delivered	30000	pounds
37	November	21, 1904,	delivered	30080	pounds
38	December	19, 1904	delivered	30765	pounds
39	January	21, 1905,	delivered	30080	pounds
40	February	18, 1905,	delivered	30112	pounds
41	March	15, 1905,	delivered	30012	pounds
42	April	10, 1905,	delivered	30180	pounds
43	May	3, 1905,	delivered	30130	pounds

44	May	22, 1905,	delivered	30130	pounds
45	June	7, 1905,	delivered	30004	pounds
46	June	26, 1905,	delivered	30045	pounds
47	July	8, 1905,	delivered	30250	pounds
48	July	24, 1905,	delivered	30010	pounds
49	August	11, 1905	delivered	30042	pounds
50	August	29, 1905,	delivered	30010	pounds
51	September	19, 1905,	delivered	30040	pounds
52	October	9, 1905,	delivered	30110	pounds
53	November	6, 1905,	delivered	30400	pounds
54	December	2, 1905,	delivered	30024	pounds
55	December	26, 1905,	delivered	30018	pounds
56	January	24, 1906,	delivered	30030	pounds
57	February	17, 1906,	delivered	30240	pounds
58	March	12, 1906,	delivered	30040	pounds
59	April	2, 1906,	delivered	30156	pounds
60	April	19, 1906,	delivered	30048	pounds
61	May	8, 1906,	delivered	30060	pounds
62	May	14, 1906,	delivered	30098	pounds
63	June	8, 1906,	delivered	30060	pounds
64	June	21, 1906,	delivered	30140	pounds
65	June	29, 1906,	delivered	30035	pounds
66	July	21, 1906,	delivered	30040	pounds
67	July	31, 1906,	delivered	30180	pounds
68	August	18, 1906,	delivered	30048	pounds
69	September	6, 1906,	delivered	30042	pounds
70	October	1, 1906,	delivered	30040	pounds

71	October	22, 1906,	delivered	32536	pounds
72	November	17, 1906,	delivered	30020	pounds
73	December	10, 1906,	delivered	30040	pounds
74	January	18, 1907,	delivered	30000	pounds
75	February	13, 1907,	delivered	30040	pounds
76	March	16, 1907,	delivered	30112	pounds

22 That the said Missouri Pacific Railway Company received and accepted each and every carload of beer delivered to it as aforesaid and transported the same over its said road to the city of Pueblo in the state of Colorado, on through bills of lading from St. Louis, Missouri, to Leadville, Colorado, and at the said city of Pueblo delivered said cars of beer and each of them to the said Denver & Rio Grande Railroad Company, and said cars of beer were and each of them was received and carried by said The Denver & Rio Grande Railroad Company over its said railroad on said through bills of lading from said city of Pueblo to said city of Leadville, and at said city of Leadville said cars of beer and each of them was delivered by the said Denver & Rio Grande Railroad Company to the complainant.

VII. That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of said carload lot of beer delivered to it on the 12th day of July, 1902, as above stated, the said Missouri Pacific Railway Company charged 95 cents for each hundred pounds of beer in gross contained in said carload lot, and upon the arrival of the same at Leadville, Colorado, the said Denver & Rio Grande Railroad Company demanded from the complainant and the complainant paid to the said Denver & Rio Grande Railroad Company, under protest, said rate or charge of 95 cents for each hundred pounds of beer in gross contained in said shipment.

That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of each of said carload lots of beer delivered to it after the 12th day of July, 1902, and prior to the 13th day of May, 1904, as above stated, the said Missouri Pacific Railway Company charged and demanded from the said The William J. Lemp Brewing Company 95 cents for each hundred pounds of beer in gross contained in each of said carload lots and the said The William J. Lemp Brewing Company at the request of the complainant prepaid to the said Missouri Pacific Railway Company at its
 23 office in said city of St. Louis, under protest, the said rate or charge of 95 cents for each hundred pounds of beer in gross contained in each of said carload lots delivered

after the 12th day of July, 1902, and prior to the 13th day of May, 1904, as aforesaid.

That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of each of said carload lots of beer delivered to it on and after the 13th day of May, 1904, as above stated, the said Missouri Pacific Railway Company charged and demanded from the said William J. Lemp Brewing Company 90 cents for each hundred pounds of beer in gross contained in each of said carload lots and the said William J. Lemp Brewing Company, at the request of complainant prepaid to the said Missouri Pacific Railway Company at its office in said city of St. Louis, under protest, the said rate of 90 cents for each hundred pounds of beer in gross contained in each of said carload lots delivered on and after the 13th day of May, 1904, as aforesaid.

That the money advanced by the said The William J. Lemp Brewing Company to pay the transportation charges demanded as aforesaid, was in each and every instance repaid by complainant to the said William J. Lemp Brewing Company.

And complainant avers that without the payment of said charges or the payment of like charges, it was not possible for the complainant to have said beer transported from said city of St. Louis to said city of Leadville at all.

And complainant avers that the rate or charge demanded and paid for the transportation by said defendants of each of said carloads of beer over their said lines of railroads from said city of St. Louis, to said City of Leadville, as aforesaid, was a through rate and a single charge for the whole of said service and that the rate or charge so made and collected for each of said shipments of beer was subsequently divided by said defendants between themselves.

That the distance from the said city of St. Louis to the said city of Leadville over the defendants said lines of transportation is one thousand and eighty (1080) miles, and the distance from the said city of St. Louis, to said Salt Lake City over the said lines of transportation of said defendants and the said Rio Grande Western Railway Company is one thousand five hundred and forty-five (1545) miles; and complainant avers that the transportation of beer in carload lots over said lines of railroad from said city of St. Louis to said city of Leadville and to said Salt Lake City respectively, was on said 12th day of July, 1902, and ever since has been under substantially similar circumstances and conditions and was over the same line in the same direction, the shorter being included within the longer distance.

That the said rates or charges demanded by the defendants and paid by the complainant for the transportation of said beer from the said city of St. Louis to the said City of Leadville as aforesaid, were and each of said rates and charges was unjust and unreasonable, and that any rate or charge in excess of 60 cents for each hundred pounds of beer so transported was unreasonable and unjust and that the rates or charges so demanded and paid were and [and] each of them was a greater compensation in the aggregate, for the transportation of said beer under substantially similar circumstances and conditions for the shorter distance to Leadville, Colorado, than for the longer distance to Salt Lake City, Utah, over the same line in the same direction, contrary to and in violation of the provisions of said Act of Congress, entitled "An Act to Regulate Commerce," approved February 4, 1887, and the amendments thereto enacted by Congress, and more particularly Sections 1 and 4 thereof; and complainant avers that in consequence of said violations of the provisions of said Act to Regulate Commerce and amendments thereto, the complainant has
25 been damaged in the sum of seven thousand, two hundred and ninety-nine dollars and twenty-seven cents (\$7,299.27) no part of which has been paid.

Wherefore complainant prays that said defendants and each of them be required to promptly answer the charges herein; that after due hearing and investigation an order be made requiring said defendants and each of them to wholly cease and desist from said violation of said Act to Regulate Commerce, as amended, and to comply with the same to the full extent thereof; that a further order be entered, fixing a reasonable and just rate for the through transportation of beer in carload lots from said city of St. Louis, to said city of Leadville, over said defendants said lines of railroad, to be observed by said defendants as a maximum rate for such through transportation; that a further order be entered requiring the defendants jointly and severally as may be found just and proper, to pay to the complainant the sum of seven thousand, two hundred and ninety-nine dollars and twenty-seven cents (\$7,299.27) as a reparation for the damages sustained by complainant in consequence of the violations of the provisions of said Act to Regulate Commerce, as amended, and that such other and further order or orders may be entered as the Commission may deem necessary in the premises and the complainant's cause may appear to require.

THE BAER BROTHERS MERCANTILE COMPANY,

By Adolph Baer,
Its President.

Dated at Denver, Colorado, April 30, A. D. 1907.
 Wm. B. Harrison, Attorney for the Complainant,
 408 Quincy Building Denver, Colorado.

State of Colorado

City and County of Denver—ss.

Adolph Baer, being first duly sworn, says that he is the president of the above named complainant Company, and that the matters set forth in the foregoing petition are true as he verily believes.

ADOLPH BAER.

26 Subscribed and sworn to before me this 30 day of April, 1907.

My commission expires October 11, 1910.

(Seal)

DWIGHT L. PARKER,
 Notary Public.

Second. A portion of the second paragraph of page twelve of said petition, found at lines twelve and thirteen of said page in words and figures as follows, to-wit:

as at large and more fully appears in and by said answers on file in the office of said Commission.

Third. A portion of said petition consisting of the paragraph thereof beginning with the twenty-third line of page twelve of said petition and ending with the tenth line of page thirteen thereof, in words and figures as follows, to-wit:

That at said hearing it was made to appear to the satisfaction of the said Commission that the said carriers, and particularly the said defendant The Denver & Rio Grande Railroad Company, had violated the provisions of said Act entitled "An Act to Regulate commerce," in certain respects, as was stated to have been violated by them in the said petition hereinbefore set forth as a part hereof, to the damage of said petitioner in the sum of three thousand four hundred and thirty-eight dollars and twenty-seven cents (\$3,438.27), and that the said damages ought to be paid to petitioner by the said defendant The Denver & Rio Grande Railroad Company; and thereupon, on the 6th day of April, 1908, the said Commission duly and legally determined the matters and things in controversy and at issue between the said parties, and made a report in writing in respect thereto, which included a statement of the conclusions of the said Commission, together with its decision awarding said damages to said petitioner, and the findings of fact on which said conclusions and award were based and made, as at large

and more fully appears in and by said report duly entered of record and on file in the office of said Commission.

Fourth. A portion of said petition, being the second paragraph of page thirteen thereof, found at lines eleven and twelve of said page, in words and figures as follows, to-wit:

"and forthwith upon the determination of said cause as aforesaid."

Fifth. A portion of said petition consisting of the paragraph beginning at the twenty-first line of page fourteen thereof and ending with the twenty-sixth line of said page, in words and figures as follows, to-wit:

That thereafter, to-wit, on the 13th day of April, 1908, the said Commission, agreeably to the provisions of the law in that regard, duly caused a properly authenticated copy of its said report, together with the order aforesaid, to be delivered to the said petitioner and to the said defendant The Denver & Rio Grande Railroad Company.

E. N. CLARK

T. L. PHILIPS

Attorneys for Defendant.

Endorsed No. 5180 in the Circuit Court District of Colorado. The Baer Bros. Mer. Co. vs. The Denver and Rio Grande Railroad Company. Defendant's motion to strike portions of the petition. Filed Jul. 25 1908 Charles W. Bishop, Clerk.

28 Fifty-Third Day, May Term. Thursday, September 3rd, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fifth day of May, A. D. 1908.

The Baer Brothers Mercantile Company

5180 vs

The Denver and Rio Grande Railroad Company

Action on a money demand

At this day comes the petitioner by William B. Harrison, Esquire, its attorney, and the respondent by Thomas L. Philips, Esquire, its attorney, also comes. And the motion of the respondent to strike out certain portions of the petition herein coming on now to be heard is argued by counsel. And the court having considered the same and being now fully advised in the premises,

It is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be, and the same is hereby, denied.

It is further ordered by the court that the respondent answer the petition herein within ten (10) days from this day.

In the Circuit Court of the United States for the
District of Colorado.
No. 5180

29 The Baer Brothers Mercantile Company, Petitioner,

vs.

The Denver and Rio Grande Railroad Company, Defendant.

Demurrer to Petition.

Defendant's Demurrer to Petition.

I.

Comes now The Denver and Rio Grande Railroad Company, defendant in the above entitled cause, by its attorneys, and demurs to the petitioner's petition herein, and for cause says: that said petition does not state facts sufficient to constitute a cause of action against this defendant.

II.

And the defendant comes as aforesaid, and demurs specially to the petitioner's petition herein, and for cause says; that said petition does not state facts sufficient to constitute a cause of action against this defendant in this, that the order or alleged or purported order of the Interstate Commerce Commission set forth in said petition, at the thirteenth and fourteenth pages thereof, is unlawful and void, and that said Interstate Commerce Commission had no power or authority under and by virtue of the Act of Congress entitled, "An Act to regulate Commerce," and the various Acts of Congress
30 amendatory thereof, or under and by virtue of any other existing law or laws to make such order.

III.

And the defendant comes as aforesaid, and demurs specially to the petitioner's petition herein, and for cause says: that said petition does not state facts sufficient to constitute a cause of action against this defendant in this; that the order or alleged or purported order of the Interstate Commerce Commission, set forth in said petition at the thirteenth and fourteenth pages thereof is unlawful and void, and that said Inter-

state Commerce Commission had no power or authority to make such order or alleged or purported order, and that therefore the facts in said petition set forth are not sufficient to confer jurisdiction upon this Honorable Court, and that this Honorable Court is without jurisdiction in the premises to hear and determine any of the matters and things in said petition recited and set forth.

E. N. CLARK and
T. L. PHILIPS,
Attorneys for Defendant.

Endorsed: No. 5180. The Baer Brothers Mercantile Company, vs. The Denver and Rio Grande Railroad Company. Defendant's Demurrer to Petition. Filed Sep. 12, 1908. Charles W. Bishop, Clerk.

31 Fifty-fourth day, May Term. Monday September 21st, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fifth day of May, A. D. 1908.

The Baer Brothers Mercantile Company,
5180 vs.
The Denver and Rio Grande Railroad Company.
Action on a Money Demand.

At this day comes the plaintiff by William B. Harrison, Esquire, its attorney, and the defendant by E. N. Clark, Esquire, and T. L. Philips, Esquire, its attorneys, also come.

And the demurrer to the petition herein coming on now to be heard is argued by counsel, and the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the petition herein is sufficient in law to be answered unto and so the said demurrer is hereby overruled.

And thereupon, it is ordered by the court that the defendant answer the petition herein within three (3) days from this day.

32 In the Circuit Court of the United States for the District of Colorado.

The Baer Brothers Mercantile Company, Petitioner,
No. 5180 vs.
The Denver and Rio Grande Railroad Company, Defendant.
Answer.

Comes now The Denver and Rio Grande Railroad Company, defendant in the above entitled cause, by its attorneys, and

files this its answer to the petition herein, and so answering, respectfully says:

First, Second, Third, Fourth, Fifth, Sixth and Seventh Separate Defenses:

1. The defendant admits that on or about the sixth day of May, 1907, the petitioner filed a complaint against this defendant and The Missouri Pacific Railway Company before the Interstate Commerce Commission and this defendant admits that said complaint so filed before the Interstate Commerce Commission was in words and figures as set forth in the petition herein upon pages 3 to 12 thereof, inclusive, and this defendant further admits that subsequent to the filing of said complaint by the petitioner before said Interstate Commerce Commission, this defendant filed its separate answer to said complaint, and for as much as the petitioner has made its said complaint, so filed before the Interstate Commerce Commission, on or about the 6th day of May, 1907, as aforesaid, a part of its said petition herein, the defendant, for a partial answer to the petition herein, and as its first, second, third, fourth, fifth, sixth, and seventh separate defenses hereto respectively, hereby, makes its said answer to the complaint of the petitioner filed before the Interstate Commerce Commission as aforesaid, and as alleged in the petition herein, a part of this answer; said separate answer of this defendant to the complaint of the petitioner, as filed before said Interstate Commerce Commission, and now made a part of the defendant's answer to the petition herein as its first, second, third, fourth, fifth, sixth and seventh separate defenses respectively, to the petition herein, being in words and figures as follows, to-wit:

Before the Interstate Commerce Commission,

The Baer Bros. Mercantile Company, Complainant,

VS.

The Missouri Pacific Railway Company and the Denver and Rio Grande Railroad Company, Defendants.

Separate Answer of the Denver and Rio Grande Railroad Company.

Comes now The Denver and Rio Grande Railroad Company, one of the defendants in above entitled cause, by its attorney, and files this its separate answer and defense to the complaint herein, and respectfully says:

34

First Defense.

1. That as to the truth of the allegations contained in the first paragraph of the complainant's complaint, this de-

fendant says that it has neither knowledge nor information sufficient upon which to base a belief.

2. That it admits the truth of the allegations contained in the second paragraph of said complaint, except the allegations therein contained to the effect that this defendant was at the times alleged in said complaint a common carrier from the city of Pueblo via City of Leadville to the city of Grand Junction, which allegation this defendant denies, and alleges the fact to be that freight traffic destined from said city of Pueblo to said city of Grand Junction does not, and at the times mentioned in said complaint did not, pass through said city of Leadville, but that on the contrary such freight traffic passes and passed through Malta Junction, a point on this defendant's main line between Pueblo and Grand Junction at a distance of 4.82 miles from said city of Leadville, and that the handling of freight traffic between Pueblo and Leadville, except in train load lots, involves extra and additional switching and handling at said Malta Junction, and an additional haul of 4.82 miles over a track characterized by steep grades and other peculiar difficulties.

3. That it admits that it is, and since the 12th day of July, 1902, has been a common carrier, and that it was at the times mentioned in said complaint a party, with the Missouri Pacific Railway Company and The Rio Grande Western Railway Company to a through route and joint rate on beer in carload lots from St. Louis to Salt Lake City, but denies that such route or rate was, or were, via the City of Leadville, and denies that this defendant is or ever was subject to the Act to regulate commerce and acts amendatory thereof and supplementary thereto as to the shipments described in said complaint, which said shipments were by this defendant received, transported, delivered and handled wholly within the State of Colorado, and were not shipped to or from a foreign country.

35 4. That it admits that this defendant and The Missouri Pacific Railway Company, as connecting carriers and not otherwise, are, and at the times alleged in said complaint were, engaged in the transportation of beer in carload lots from the city of St. Louis, in the state of Missouri, to the said city of Leadville, in the state of Colorado, but denies that at said times, or any of them, said shipments, or any of them, were made under or by virtue of a common control, management or arrangement for the continuous carriage of shipments of beer in carload lots from St. Louis to Leadville, and denies that at said times or any of them, this defendant was, or is, subject to the Act to regulate commerce and acts

amendatory thereof and supplementary thereto as to the shipments described in said complaint, which said shipments were by this defendant received, transported, delivered and handled wholly within the state of Colorado, and were not shipped to or from a foreign country.

5. That it admits that on or about the 12th day of July, 1902, The Missouri Pacific Railway Company, The Denver and Rio Grande Railroad Company, and The Rio Grande Western Railway Company had established and published a joint tariff of rates or charges for the transportation of beer in carload lots over the lines of railroad of said last named companies from said city of St. Louis to the city of Salt Lake in the State of Utah, and that the rate or charge so established was seventy cents for each one hundred pounds, and that said rate or charge has ever since said date been, and now is, in force.

6. That this defendant admits that at certain times within the period described in paragraph six of said complaint, The William J. Lemp Brewing Company of said city of St. Louis, Missouri, at the request of the complainant delivered to The Missouri Pacific Railway Company at said city of St. Louis, beer in carload lots to be carried over the line of said The

36 Missouri Pacific Railway Company to the city of Pueblo, and thence by some other line or lines to the City of Leadville, the weights and dates of which said shipments are to this defendant now unknown, but denies that said The Missouri Pacific Railway Company received and accepted or transported each and every or any of said shipments to said City of Pueblo on through Bills of Lading from said City of St. Louis, via the lines of this defendant, and denies that said The Missouri Pacific Railway Company possessed any authority, or was in any manner instructed or directed or authorized to receive, accept or transport said beer, or any part thereof, on through bills of lading via the lines of this defendant, and denies that said alleged shipments, or any of them, were received or carried by this defendant from said City of Pueblo to said City of Leadville on through bills of lading from St. Louis to Leadville, but on the contrary thereof this defendant alleges the fact to be that this defendant transported all such shipments, by it transported, on local billing from said City of Pueblo to said City of Leadville, and as local and intrastate shipments, and solely in accordance with its own local rate theretofore duly established by it and in force at the times of the several shipments transported by it.

7. That it admits that it demanded and collected of the complainant 95 cents for each one hundred pounds of beer

contained in a certain carload shipment thereof, described in the first clause of paragraph seven of said complaint, but denies that said demand and collection was upon a joint rate from said City of Salt Lake to said City of Leadville, or that the defendant and said The Missouri Pacific Railway Company had theretofore entered into any agreement whatsoever as to a through route or joint rate between said points, and denies that this defendant transported said shipment or any of the shipments described in said complaint otherwise than as local shipments from Pueblo to Leadville, in accordance with its local rate, and denies that there was any arrangement between

37 itself and the said The Missouri Pacific Railway Company for a conventional division of the earnings on said shipments, or any of them, or any division thereof, and as to whether or not the payment described in said first clause of paragraph seven was made under protest, this defendant says that it has not and cannot obtain knowledge or information sufficient upon which to base a belief. This defendant further denies that the complainant, or the William J. Lemp Brewing Company or any other person or corporation, either at the time of making payments of freight charges as alleged in said paragraph seven, or any other time, protested to this defendant or to any officer, agent or employe of this defendant authorized to act for it in the premises, against said payments to the Missouri Pacific Railway Company.

This defendant further admits that it received from the Missouri Pacific Railway Company compensation for the transportation of all shipments of beer in carload lots shipped by the said The William J. Lemp Brewing Company to the complainant herein subsequent to the 12th day of July, 1902, at the rate of 45 cents per hundred pounds, and alleges that said rate of 45 cents per hundred pounds was this defendant's local rate for transportation of beer in carload lots from Pueblo to Leadville, and not a division upon a conventional basis or otherwise, of a through rate from the City of St. Louis to said City of Leadville, and admits that its local rate was prepaid at said City of St. Louis, but denies that said complainant or anybody on behalf of said complainant, ever protested to this defendant or to any officer, agent or employe of this defendant authorized to act for it in the premises, against the payment of said rate or of any rate under which said shipments described in said complaint were transported.

Further answering the allegations contained in paragraph seven of said complaint, this defendant says: that as to whether or not the alleged advances by said The William J. Lemp Brew-

ing Company on behalf of said complainant, were in
38 every instance, or at all, repaid by said complainant,
this defendant has not and cannot obtain knowledge or
information sufficient upon which to base a belief.

Further answering the allegations contained in paragraph seven of said complaint this defendant says: that as to whether or not without the payment of like charges to those alleged in said complaint it was impossible for the complainant to have the shipments described in said complaint transported from the City of St. Louis to the City of Leadville at all this defendant has not, and cannot obtain, knowledge or information sufficient upon which to base a belief, but alleges the fact to be that lines of transportation other than those of the defendants herein, or either of them, were at all times available to the complainant for the transportation of said shipments, and further says that the Chicago, Burlington and Quincy Railway Company and The Atchison, Topeka and Santa Fe Railway Company, and the Chicago, Rock Island and Pacific Railway Company, each and all of them afforded lines of transportation available to the complainant from said City of St. Louis to Colorado common points, and that the Colorado Midland Railway Company and The Colorado and Southern Railway Company also afforded lines of transportation available to said complainant between said Colorado common points and said City of Leadville, and that it was in no manner necessary for said complainant to avail itself of the transportation facilities afforded by the defendants herein, or either of them.

Further answering the allegations contained in paragraph seven of said complaint, this defendant denies that the rates or charges alleged to have been demanded and paid for the transportation by the defendants herein of the shipments described in said complaint were, or that any of said rates or charges was, a through rate or a single charge for the whole of said service, or that any of such rates or charges were made or collected as alleged in said complaint, or that said rate or charge, or that any of said rates or charges was subsequently divided by said defendants between them-
39 selves but alleges the fact to be that in each and every case this defendant received only its local intrastate rate and charge on said shipments from said City of Pueblo to said City of Leadville.

Further answering the allegations contained in paragraph seven of said complaint, this defendant says that it admits that the distance from said City of St. Louis to said City of Leadville, over the lines of the defendants herein, is 1080

miles, and that the distance from the said City of St. Louis to the said City of Salt Lake, over the lines of the defendants herein and the line of the Rio Grande Western Railway Company, is 1545 miles, but denies that the transportation of beer in carload lots over said lines of railroad from the City of St. Louis to the City of Leadville and to the said City of Salt Lake, was, on said 12th day of July, 1902, or at any time subsequent thereto, or that it now is, or ever has been under substantially similar circumstances and conditions, and further alleges that the said City of Leadville is not located on the line of railroad over which transportation is conducted between said City of St. Louis and said City of Salt Lake, but that said City of Leadville is off said line and is reached only by a branch line, transportation thereto involving additional switching and a separate and distinct haul over a branch line.

Further answering the allegations contained in said paragraph seven of said complaint, this defendant, denies that the rate or charge received by this defendant, namely: 45 cents per hundred pounds for transportation from the City of Pueblo to the City of Leadville, or that the rates of transportation charged and collected by The Missouri Pacific Railway Company for the transportation of shipments described in said complaint from the City of St. Louis to the City of Pueblo was, or were, or that either or any of them was, or were, unjust or unreasonable, and denies that a rate of sixty cents per hundred pounds for said shipments or similar shipments from

40 the City of St. Louis to said City of Leadville would be either just or reasonable or adequate compensation for such transportation, and denies that said rate or rates, or any of them, constituted, or was, a greater compensation in the aggregate for the transportation of said shipments under substantially similar circumstances and conditions for the shorter distance to Leadville than for the longer distance to Salt Lake City, Utah, and denies that the circumstances and conditions surrounding, attending and controlling such shipments are substantially, or at all similar, and denies that such shipments to said City of Leadville and to said City of Salt Lake are over the same line in the same direction or that the shorter is included in the longer distance, and denies any violations of the provisions of said Act to regulate commerce or acts amendatory thereof or supplementary thereto, or of sections one or four thereof, in connection with any of the shipments described in said complaint, and denies that said complainant has been in any manner whatsoever injured or damaged by this defendant, either acting alone or in connection with any other carrier or carriers.

Wherefore this defendant prays that said complaint may be dismissed as to this defendant.

Second Defense.

For a second and further separate answer and defense to the matters and things alleged in said complaint, this defendants says:

1. That heretofore and on or about the 14th day of September 1906 the complainant herein instituted in the United States Circuit Court for the District of Colorado at Denver, Colorado its certain action at law, whereof said court had jurisdiction both as to the parties thereto and the subject matter thereof, against this defendant and The Missouri Pacific Railway Company, its co-defendant herein, wherein and whereby the complainant herein sought to recover of said defendants jointly the sum of six thousand three hundred thirty one dollars and eight cents (\$6,331.08) damages alleged to have been sustained by said complainant by reason, and in consequence of the identical matters, things, shipments and payments in its complaint herein alleged, except certain shipments and payments subsequent to June 29, 1906, and wherein and whereby it charged said defendants with violations of said Act to regulate commerce and acts amendatory thereof and supplementary thereto, as it has in its complaint herein charged, and that thereafter on or about the 19th day of February, 1907, said complainant, in obedience to an order of said Court, filed in said court a verified amended complaint in words and figures as follows to-wit:

United States of America,

District of Colorado—ss.

In the Circuit Court of the United States for
the District of Colorado.

The Baer Bros. Mercantile Company, Plaintiff,

vs.

The Missouri Pacific Railway Company and the Denver
and Rio Grande Railroad Company, Defendants.

Amended Complaint.

The plaintiff files this, its amended complaint, and alleges:

First: For a first cause of action:

1. That on to-wit; the 12th day of July, A. D. 1902, the above named plaintiff was, and ever since has been, a corporation organized and existing under and by virtue of the

laws of the State of Colorado, and was at the time aforesaid, and ever since has been engaged in the business of importers and jobbers of beer and other liquors in the City of Leadville, in the State of Colorado.

II. That on to-wit: the 12th day of July, 1902, the above named defendant the Missouri Pacific Railway Company was, and ever since has been and is now, a corporation and common carrier engaged in the transportation of persons and [properly] wholly by railroad from the City of St. Louis in the State of Missouri to the City of Pueblo, in the State of Colorado, and that the above named defendant The Denver and Rio Grande Railroad Company was at the time aforesaid, and ever since has been, a corporation and common carrier engaged in the transportation of persons and property wholly by railroad from the said City of Pueblo via the said City of Leadville to the City of Grand Junction in the State of Colorado, the plaintiff avers that the Rio Grande Western Railway Company was at the time aforesaid and ever since has been a corporation and common carrier engaged in the transportation of persons and property wholly by railroad from the said City of Grand Junction to Salt Lake City, in the State of Utah.

III. That the defendants above named and the said Rio Grande Western Railway Company were, on said 12th day of July, 1902, and ever since have been common carriers, and under a common control, management or arrangement for continuous carriage or shipment, were on said date and ever since have been engaged in the transportation of beer in earload lots and other property wholly by their said railroads from the City of St. Louis, in the State of Missouri, via Leadville, Colorado, and Grand Junction, Colorado, to Salt Lake City, in the State of Utah, and as such common carriers the said defendants were on said date and ever since have been subject to the provisions of the Act of Congress entitled, "An Act to Regulate Commerce," approved February 4, 1887, and the amendments thereto enacted by Congress.

IV. That on the said 12th day of July, 1902, the defendants above named were and ever since have been common carriers, and under a common control, management or arrangement for continuous carriage or shipment were on said date and ever since have been engaged in the transportation of persons and property wholly by their said railroads from the City of St. Louis, in the State of Missouri, to the City of Leadville, in the State of Colorado, and as such common car

riers were on said date, and ever since have been, sub-
43 ject to the provisions of the Act of Congress entitled,
"An Act to Regulate Commerce," approved February 4,
1887, and the amendments thereto enacted by Congress.

V. That on the said 12th day of July, 1902, the defend-
ants above named and said Rio Grande Western Railway
Company had established and published a joint tariff of rates
or charges for the transportation of beer in car loads over
their said lines of railroad from the City of St. Louis to
said Salt Lake City, and that the rate or charge so establish-
ed and published was 70 cents for each one hundred pounds
of beer in gross transported as aforesaid, which rate or charge
has ever since said date been in force.

VI. That on the dates hereinafter mentioned the defend-
ants above named established and published a joint tariff of
rates or charges for the transportation of beer in earloads
over their said lines of railroad from the said city of St.
Louis to said City of Leadville, and that the rate or charge
so established and published and in force on and after the
12th day of July, 1902, and prior to the 13th day of May,
1904 was 95 cents for each hundred pounds of beer in gross
transported, as aforesaid and that on the 13th day of May,
1904, the rate or charge so established and published and in
force was and ever since said last named date has been, 90
cents for each hundred pounds of beer in gross transported
as aforesaid.

VII. That the distance from the City of St. Louis to said
City of Leadville over defendant's said lines of transporta-
tion is 1080 miles, and the distance from the said City of
St. Louis to said Salt Lake City over said lines of transporta-
tion of said defendants and said Rio Grande Western Rail-
way Company is one thousand five hundred and forty five
(1545) miles; and plaintiff avers that the transportation of
beer in earload lots over said lines of railroad from said City
of St. Louis to said City of Leadville and to said Salt Lake
City respectively was, on said 12th day of July 1902 and ever
since has been, under substantially similar circum-
44 stances and conditions, and was over the same line in
the same direction the shorter being included within
the longer distance.

VIII. That at the times hereinafter mentioned The Wil-
liam J. Lemp Brewing Company of said City of St. Louis,
at the request of plaintiff, delivered to the said Missouri
Pacific Railway Company at said City of St. Louis, certain
beer in half barrels, quarter barrels and other packages in

carload lots, belonging to the plaintiff, to be carried over defendants said lines of railroad to the said City of Leadville and at said City of Leadville to be delivered to the plaintiff. That the gross weight of each carload lot of beer so delivered and the date of delivery of the same to the said Missouri Pacific Railway Company as aforesaid, was as follows, to-wit:

45	July 12, 1902	delivered 30090 pounds
	July 28, 1902	delivered 31545 pounds
	August 12, 1902	delivered 30348 pounds
	August 22, 1902	delivered 30170 pounds
	September 9, 1902	delivered 30225 pounds
	September 20, 1902	delivered 30036 pounds
	October 13, 1902	delivered 30060 pounds
	November 5, 1902	delivered 30060 pounds
	December 6, 1902	delivered 30060 pounds
	December 27, 1902	delivered 30036 pounds
	January 26, 1903	delivered 30036 pounds
	February 25, 1903	delivered 30000 pounds
	April 1, 1903	delivered 30105 pounds
	May 4, 1903	delivered 30030 pounds
	May 25, 1903	delivered 30195 pounds
	June 16, 1903	delivered 30175 pounds
	June 30, 1903	delivered 30130 pounds
	July 29, 1903	delivered 30145 pounds
	August 3, 1903	delivered 30300 pounds
	August 17, 1903	delivered 30141 pounds
	September 12, 1903	delivered 30045 pounds
	October 10, 1903	delivered 30060 pounds
	November 4, 1903	delivered 30363 pounds
	December 7, 1903	delivered 30090 pounds
	January 13, 1904	delivered 30045 pounds
	February 20, 1904	delivered 30080 pounds
	March 22, 1904	delivered 30030 pounds
	April 18, 1904	delivered 30045 pounds
	May 13, 1904	delivered 30063 pounds
	June 7, 1904	delivered 30295 pounds
	June 30, 1904	delivered 30280 pounds
	July 22, 1904	delivered 30045 pounds
	August 15, 1904	delivered 30095 pounds
	September 7, 1904	delivered 30154 pounds
	September 27, 1904	delivered 30156 pounds
	October 24, 1904	delivered 30000 pounds
	November 21, 1904	delivered 30080 pounds

	December 19, 1904	delivered 30765 pounds
	January 21, 1905	delivered 30080 pounds
	February 18, 1905	delivered 30112 pounds
	March 15, 1905	delivered 30012 pounds
	April 10, 1905	delivered 30180 pounds
	May 3, 1905	delivered 30130 pounds
	May 22, 1905	delivered 30130 pounds
	June 7, 1905	delivered 30000 pounds
	June 26, 1905	delivered 30045 pounds
	July 8, 1905	delivered 30250 pounds
	July 24, 1905	delivered 30010 pounds
	August 11, 1905	delivered 30042 pounds
	August 29, 1905	delivered 30010 pounds
	September 19, 1905	delivered 30040 pounds
	October 9, 1905	delivered 30110 pounds
46	November 6, 1905	delivered 30400 pounds
	December 2, 1905	delivered 30024 pounds
	December 26, 1905	delivered 30018 pounds
	January 24, 1906	delivered 30030 pounds
	February 17, 1906	delivered 30240 pounds
	March 12, 1906	delivered 30040 pounds
	April 2, 1906	delivered 30158 pounds
	April 19, 1906	delivered 30048 pounds
	May 8, 1906	delivered 30060 pounds
	May 14, 1906	delivered 30098 pounds
	June 8, 1906	delivered 30060 pounds
	June 21, 1906	delivered 30140 pounds
	June 29, 1906	delivered 30035 pounds

That the said Missouri Pacific Railway Company received and accepted each and every car load lot of beer delivered to it as aforesaid and transported the same over its said road to the City of Pueblo, in the State of Colorado, on through bills of lading from St. Louis, Missouri, to Leadville, Colorado, and at the said City of Pueblo delivered said cars of beer and each of them to the said Denver and Rio Grande Railroad Company, and said cars of beer were and each of them was received and carried by said The Denver and Rio Grande Railroad Company over its said railroad on said through bills of lading from said City of Pueblo to said City of Leadville, and at said City of Leadville, said cars of beer were and each of them was delivered by the said Denver and Rio Grande Railroad Company to the plaintiff.

IX. That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of said carload lot of beer delivered to it on the 12th day of July 1902, as above stated, the said Missouri Pacific Railway Company charged 95 cents for each hundred pounds of beer in gross contained in

said carload lot, and upon the arrival of the same at Leadville, Colorado, The Denver and Rio Grande Railroad Company demanded from the plaintiff, and the plaintiff paid to said The Denver and Rio Grande Railroad Company under protest, said rate or charge of 95 cents for each hundred pounds of beer in gross contained in said shipment.

That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of each said carload lots of beer delivered to it after the 12th day of July, 1902, and prior to the 13th day of May, 1904 as above stated, the said Missouri Pacific Railway Company charged and demanded from the said William J. Lemp Brewing Company, 95 cents for each hundred pounds of beer in gross contained in each of said carload lots and the said William J. Lemp Brewing Company, at the request of plaintiff prepaid to the said Missouri Pacific Railway Company at its office in said City of St. Louis, Missouri, under protest the said rate or charge of 95 cents for each hundred pounds of beer in gross contained in each of said carload lots delivered after the 12th day of July, 1902, and prior to the 13th day of May, 1904, as aforesaid.

That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of each of said carload lots of beer delivered to it on and after the 13th day of May, 1904, as above stated, the said Missouri Pacific Railway Company charged and demanded from the said William J. Lemp Brewing Company 90 cents for each hundred pounds of beer in gross contained in each of said carload lots, and said William J. Lemp Brewing Company at the request of plaintiff prepaid to the said Missouri Pacific Railway Company at its office in said City of St. Louis, under protest, the said rate or charge of 90 cents for each hundred pounds of beer in gross contained in each of said carload lots delivered on and after the 13th day of May, 1904, as aforesaid.

And plaintiff avers that the money advanced by the said William J. Lemp Brewing Company to pay the transportation charges demanded as aforesaid, was in each and every instance repaid by plaintiff to the said William J. Lemp Brewing Company.

48 And plaintiff avers that without the payment of said charges or the payment of like charges, it was not possible for the plaintiff to have said beer transported from said City of St. Louis to said City of Leadville at all.

And plaintiff avers that the said rates or charges established and demanded by the defendants and paid by the plaintiff for the transportation of said beer from the said City of St. Louis,

to the said City of Leadville, as aforesaid, were and each of said rates and charges was a greater compensation in the aggregate for the transportation of said beer under substantially similar circumstances and conditions for the shorter distance to Leadville, Colorado, than for the longer distance to Salt Lake City, Utah, over the same line in the same direction, the shorter being included in the longer distance, contrary to and in violation of the provisions of said Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and the amendments thereto enacted by Congress; and plaintiff avers that in consequence of said violations of the provisions of said Act to regulate commerce, and amendments thereto, the plaintiff was damaged in the sum of four thousand three hundred and forty dollars and fifty four cents (\$4,340.54), no part of which has been paid.

Second: For a second cause of action:

I. That on to-wit, the 12th day of July, A. D. 1902, the above named plaintiff was and ever since been a corporation organized and existing under and by virtue of the laws of the State of Colorado, and was, at the time aforesaid, and ever since has been engaged in the business of importers and jobbers of beer and other liquors, in the City of Leadville, in the State of Colorado.

II. That on, to-wit, the 12th day of July, 1902, the above named defendant The Missouri Pacific Railway Company was, and ever since has been and is now, a corporation and common carrier engaged in the transportation of persons and property wholly by railroad from the City of St. Louis, in the State of Missouri, to the City of Pueblo, in the State of Colorado, and that the above named defendant The Denver and Rio Grande Railroad Company was at the time aforesaid, and ever since has been a corporation and common carrier engaged in the transportation of persons and property wholly by railroad from the said City of Pueblo, to the said City of Leadville, in the State of Colorado.

III. That on said 12th day of July, 1902, the defendants above named were and ever since have been common carriers and under a common control, management or arrangement for continuous carriage or shipment were on said date, and ever since have been engaged in the transportation of persons and property wholly by their said railroads from the City of St. Louis, in the State of Missouri, to the City of Leadville, in the State of Colorado, and as such common carriers were on said date and ever since have been subject to the provisions of the Act of Congress entitled, "An Act to Regulate Commerce,"

approved February 4, 1887, and the amendments thereto enacted by Congress.

IV. That on the dates hereinafter mentioned the defendants above named established and published a joint tariff of rates or charges for the transportation of beer in carloads over their said lines of railroad from the said City of St. Louis to said City of Leadville, and that the rate or charges so established and published and in force on and after the 12th day of July, 1902, and prior to the 13th day of May, 1904, was 95 cents for each hundred pounds of beer in gross transported, as aforesaid.

V. That at the times hereinafter mentioned, the William J. Lemp Brewing Company of said City of St. Louis, at the request of plaintiff delivered to the said Missouri Pacific Railway Company at said City of St. Louis, certain beer in half barrels, quarter barrels, and other packages in carload lots, belonging to the plaintiff, to be carried over defendants' said lines of railroad to the said City of Leadville, and at said City of Leadville to be delivered to the plaintiff. That
 50 the gross weight of each carload lot of beer so delivered, and the date of the delivery of the same to the said Missouri Pacific Railway Company as aforesaid, was as follows, to-wit:

July 12, 1902	delivered 30090 pounds
July 28, 1902	delivered 31545 pounds
August 12, 1902	delivered 30348 pounds
August 22, 1902	delivered 30170 pounds
September 9, 1902	delivered 30225 pounds
September 20, 1902	delivered 30036 pounds
October 13, 1902	delivered 30060 pounds
November 5, 1902	delivered 30060 pounds
December 6, 1902	delivered 30060 pounds
December 27, 1902	delivered 30036 pounds
January 26, 1903	delivered 30036 pounds
February 25, 1903	delivered 30000 pounds
April 1, 1903	delivered 30105 pounds
May 4, 1903	delivered 30030 pounds
May 25, 1903	delivered 30195 pounds
June 16, 1903	delivered 30175 pounds
June 30, 1903	delivered 30130 pounds
July 29, 1903	delivered 30145 pounds
August 3, 1903	delivered 30300 pounds
August 17, 1903	delivered 30141 pounds
September 12, 1903	delivered 30045 pounds
October 10, 1903	delivered 30060 pounds
November 4, 1903	delivered 30363 pounds

51	December 7, 1903	delivered 30090 pounds
	January 13, 1904	delivered 30045 pounds
	February 20, 1904	delivered 30080 pounds
	March 22, 1904	delivered 30030 pounds
	April 18, 1904	delivered 30045 pounds
	May 13, 1904	delivered 30063 pounds
	June 7, 1904	delivered 30295 pounds
	June 30, 1904	delivered 30280 pounds
	July 22, 1904	delivered 30045 pounds
	August 15, 1904	delivered 30095 pounds
	September 7, 1904	delivered 30154 pounds
	September 27, 1904	delivered 30156 pounds
	October 24, 1904	delivered 30000 pounds
	November 21, 1904	delivered 30080 pounds
	December 19, 1904	delivered 30765 pounds
	January 21, 1905	delivered 30080 pounds
	February 18, 1905	delivered 30112 pounds
	March 15, 1905	delivered 30012 pounds
	April 10, 1905	delivered 30180 pounds
	May 3, 1905	delivered 30130 pounds
	May 22, 1905	delivered 30130 pounds
	June 7, 1905	delivered 30000 pounds
	June 26, 1905	delivered 30045 pounds
	July 8, 1905	delivered 30250 pounds
	July 24, 1905	delivered 30010 pounds
	August 11, 1905	delivered 30042 pounds
	August 29, 1905	delivered 30010 pounds
	September 19, 1905	delivered 30040 pounds
	October 9, 1905	delivered 30110 pounds
	November 6, 1905	delivered 30400 pounds
	December 2, 1905	delivered 30024 pounds
	December 26, 1905	delivered 30016 pounds
	January 24, 1906	delivered 30030 pounds
	February 17, 1906	delivered 30240 pounds
	March 12, 1906	delivered 30040 pounds
	April 2, 1906	delivered 30158 pounds
	April 19, 1906	delivered 30048 pounds
	May 8, 1906	delivered 30060 pounds
	May 14, 1906	delivered 30098 pounds
	June 8, 1906	delivered 30060 pounds
	June 21, 1906	delivered 30140 pounds
	June 29, 1906	delivered 30035 pounds

52 That the said Missouri Pacific Railway Company received and accepted each and every carload lot of beer delivered to it as aforesaid, and transported the same over its said road to the City of Pueblo in the State of Colorado on through bills of lading from St. Louis, Missouri, to Leadville,

Colorado, and at the said City of Pueblo, delivered said cars of beer and each of them to the said The Denver and Rio Grande Railroad Company, and said cars of beer were and each of them was received and carried by said Denver and Rio Grande Railroad Company over its said railroad on said through bills of lading from the City of Pueblo to said City of Leadville, and at said City of Leadville, said cars of beer were and each of them was delivered by the said Denver and Rio Grande Railroad Company to plaintiff.

VI. That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of said carload lot of beer delivered to it on the 12th day of July, 1902, as above stated, the said Missouri Pacific Railway Company charged 95 cents for each hundred pounds of beer in gross contained in said carload lot, and upon the arrival of the same at Leadville, Colorado, the said Denver and Rio Grande Railroad Company demanded from the plaintiff and the plaintiff paid to said Denver and Rio Grande Railroad Company, under protest, said rate or charge of 95 cents for each hundred pounds of beer in gross contained in said shipment.

That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of each of said carload lots of beer delivered to it after the 12th day of July, 1902, and prior to the 13th day of May, 1904, as above stated, the said Missouri Pacific Railway Company charged and demanded from the said William J. Lemp Brewing Company 95 cents for each hundred pounds of beer in gross contained in each of said carload lots and the said William J. Lemp Brewing Company at the request of Plaintiff prepaid to the said Missouri

53 Pacific Railway Company, at its office in said City of St. Louis, under protest, the said rate or charge of 95 cents for each hundred pounds of beer in gross contained in each of said carload lots delivered after the 12th day of July, 1902, and prior to the 13th day of May, 1904, as aforesaid.

That as compensation for the transportation from St. Louis, Missouri, to Leadville, Colorado, of each of said carload lots of beer delivered to it on and after the 13th day of May, 1904, as above stated, [and] said Missouri Pacific Railway Company charged and demanded from the said William J. Lemp Brewing Company 90 cents for each hundred pounds of beer in gross contained in each of said carload lots and the said William J. Lemp Brewing Company, at the request of plaintiff, prepaid to the said Missouri Pacific Railway Company at its office in said City of St. Louis, under protest, the said rate or charge of 90 cents for each hundred pounds of beer in gross

contained in each of said carload lots delivered on and after the 13th day of May, 1904, as aforesaid.

The plaintiff avers that the money advanced by the said William J. Lemp Brewing Company to pay the transportation charges demanded as aforesaid, was in each and every instance, repaid by the plaintiff to the said William J. Lemp Brewing Company.

And plaintiff avers that without the payment of said charges or the payment of like charges, it was not possible for the plaintiff to have said beer transported from said City of St. Louis, to said City of Leadville, at all.

And plaintiff avers that the said rates or charges established and demanded by the defendants and paid by the plaintiff for the transportation of said beer from the said City of St. Louis, to the said City of Leadville, as aforesaid, were, and each of said rates and charges was, unjust and unreasonable and contrary to, and in violation of, the provisions of said Act of Congress entitled, "An Act to regulate commerce", approved February 4, 1887, and the amendments thereto enacted by Congress; the plaintiff avers that in consequence of said violations of the provisions of said Act to regulate commerce and amendments thereto, the plaintiff was damaged in the sum of six thousand three hundred dollars (\$6300.00), no part of which has been paid.

Wherefore, the plaintiff demands judgment against the defendants for the sum of six thousand three hundred dollars (\$6300.00) together with interest, and for its costs including a reasonable attorneys fee, to be taxed by the court.

WM. B. HARRISON,
Attorney for Plaintiff.

State of Colorado,

City and County of Denver—ss.

William B. Harrison, being first duly sworn on oath deposes and says: that he is attorney for the Baer Bros. Mercantile Company, the Plaintiff in the above entitled action; that he has read the foregoing amended complaint, and that the facts therein stated are true as he verily believes. That he makes this affidavit for the reason that the proper officer of the said plaintiff Company is absent from the State of Colorado.

WM. B. HARRISON.

Subscribed and sworn to before me this 18th day of February,
A. D. 1907. My commission expires.....

.....
Notary Public.

to which said amended complaint this defendant jointly, with its co-defendant, demurred generally on the ground that said amended complaint did not state facts sufficient to constitute a cause of action against said defendants or either of them, which said demurrer was thereafter argued to the court, whereupon the court advised said complainant that it had, in its said amended complaint stated itself out of court, and allowed said complainant further time to consider the law of the case. Whereupon, on or about the 2nd day of May, 1907, said complainant, of its own motion, voluntarily dismissed said cause of record, all of which, except the aforesaid statement of the court to said complainant, will more fully appear from the records and files of said court.

Wherefore this defendant charges that having elected to bring said suit in said Circuit Court, as aforesaid, in its own behalf, for the recovery of damages under the provisions of said Act to regulate commerce, and acts amendatory thereof and supplementary thereto, and especially Section nine of said Act, said complainant is barred, estopped and prohibited by said Act, and especially by Section nine thereof, from further maintaining and prosecuting this action, and the complaint herein should be dismissed.

Third Defense.

For a third and further separate answer and defense to the matters and things alleged in said complaint, this defendant says;

1. That during all of the times in said complaint mentioned, this defendant owned, controlled and operated a line of railroad from the City of Pueblo, in the State of Colorado, through Malta Junction, in said State of Colorado, to the City of Grand Junction, in said State of Colorado, and that at said City of Grand Junction, the railroad of this defendant connected with the railroad of The Rio Grande Western Railway Company, which extended thence to the City of Salt Lake, in the State of Utah, and that the Missouri Pacific Railway extending and operating from the City of St. Louis, in the State of Missouri, to said City of Pueblo, and there connecting with The Denver and Rio Grande Railroad: the Denver and Rio Grande Railroad extending and operating from said City of Pueblo to said City of Grand Junction, and there connecting with The Rio Grande Western Railway, and The Rio Grande Western Railway extending and operating from said City of Grand Junction to said City of Salt Lake, constitute, and during all of the times in said complaint mentioned did constitute, a line of railroad from said

City of St. Louis, to said City of Salt Lake, but this defendant denies that The Rio Grande Western Railway forms, or ever formed, any part of a through line from said City of St. Louis to said City of Grand Junction, or said City of Leadville, and denies that said City of Leadville is on said through line.

2. This defendant further alleges that from November 57 6, 1900, to November 27, 1902, inclusive, the rate on beer in carloads, minimum weight 30,000 pounds, via The Missouri Pacific Railway from St. Louis to Pueblo was 50 cents per hundred pounds, and that said rate via said railway was duly established, published and filed with the Interstate Commerce Commission, as Trans-Missouri Freight Bureau Joint Freight Tariff No. 11-B (I. C. C. No. 88), and that all shipments described in said complaint, between said last mentioned dates were transported from St. Louis to Pueblo under, and in accordance with, the provisions of said published tariffs, and not otherwise.

3. This defendant further says that from November 28, 1902 to April 28, 1904, inclusive, the rate on beer in carloads, minimum weight 30,000 pounds, via the Missouri Pacific Railway from St. Louis to Pueblo was 50 cents per hundred pounds, and that said rate via said Railway was duly established, published and filed with the Interstate Commerce Commission as Trans-Missouri Freight Bureau Joint Freight Tariff No. 11-C (I. C. C. No. 123), and that all shipments described in said complaint between said last mentioned dates were transported from St. Louis to Pueblo under and in accordance with the provisions of said published tariff and not otherwise.

4. This defendant further says that from April 29, 58 1904 to August 8, 1904, inclusive, the rate on beer in carloads, minimum weight 30,000 pounds, via The Missouri Pacific Railway from St. Louis to Pueblo was 45 cents per hundred pounds, and that said rate was duly established, published and filed with the Interstate Commerce Commission as Amendment No. 36 to the Trans-Missouri Freight Bureau Joint Freight Tariff No. 11-C Amendment No. 36 (I. C. C. No. 123), and that all shipments described in said complaint between said last mentioned dates were transported from St. Louis to Pueblo under and in accordance with the provisions of said published tariff, and not otherwise.

5. This defendant further says that from August 8, 1904 to March 16, 1907, inclusive, and thereafter, the rate on beer in carloads, minimum weight 30,000 pounds, via The Missouri Pacific Railway, from St. Louis to Pueblo, was 45 cents per hundred pounds, and that said rate was duly established, published and filed with the Interstate Commerce Commission, as

Trans-Missouri Freight Bureau Joint Freight Tariff No. 11-D (I. C. C. No. 158) and that all shipments described in said complaint between said last mentioned dates were transported from St. Louis to Pueblo under, and in accordance with the provisions of said published tariff, and not otherwise.

59 6. Further answering, this defendant says that during all of the times mentioned in said complaint, this defendant received the shipments described in said complaint, and each and every of them from The Missouri Pacific Railway Company as a connecting carrier and not otherwise, and as it would, and did, receive similar shipments from other shippers at Pueblo, and that it transported said shipments to Leadville as local shipments not shipped to, or from, a foreign country, and not under and in accordance with through bills of lading or other through billing, but only under and in accordance with its local billing from Pueblo to Leadville, and wholly within the State of Colorado, and at its regular rate then established and in force, namely: at the rate of 45 cents for each hundred pounds of such shipments, which said rate was never published or filed as an interstate rate or as any part of such interstate rate.

Wherefore this defendant says that the shipments described in said complaint were by this defendant received, transported, delivered and handled wholly within the State of Colorado, and were not shipped to, or from, a foreign country, and as to this defendant, were not subject to said Act to regulate commerce or acts amendatory thereof or supplementary thereto, and that as to this defendant said complaint should be dismissed.

60

Fourth Defense.

For a fourth and separate answer and defense to the matters and things alleged in said complaint herein, this defendant says:

1. That the complainant herein ought not to recover against this defendant for the damages alleged to have been sustained by said complainant by reason of the alleged violations by the defendants or either of them of the Act to Regulate Commerce and acts amendatory thereof and supplementary thereto, insofar as such alleged violations or offenses antedate, or were committed more than one year last preceding the 6th day of May, 1907, when this action was commenced, because said Act to Regulate Commerce and acts amendatory thereof and supplementary thereto are penal statutes, and the damages sought to be herein recovered by said complainant are penalties given and allowed by said Act to said complainant against the defendants for alleged violations thereof extending over several

years preceding the commencement of this action, and insofar as said complaint seeks the recovery of damages or penalties or reparation for violations of said acts committed more than one year last preceding the commencement of this action, the right so to do is barred by Section 8 of the statute of limitations of the State of Colorado, being Chapter 60 of the General Laws of Colorado, 1877, Section 2907, Mills' Annotated Statutes, which provides that:

All actions and suits, for any penalty or forfeiture of any penal statute brought by this State, or any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year after the offense is committed, and not after that time.

and this defendant does hereby claim the benefit of such statute of limitations of the State of Colorado, in such case made and provided.

Fifth Defense.

For a fifth and further separate answer and defense to the matters and things alleged in said complaint herein, this defendant says:

1. That The Rio Grande Western Railway Company was not, and is not, a party to, interested in, or in any manner concerned with, the rates of the defendants herein between St. Louis and Leadville, or any rates whatsoever between points on the lines of these defendants or either of them, and further says that the eastern terminus of this defendant's lines of railway is at Denver, in the State of Colorado; its main line for east and west traffic extends from Denver south to Pueblo; thence westerly to Malta Junction, whence a branch line extends to the City of Leadville, said main line continuing from

62 Malta Junction northwesterly and westerly to its westerly terminus at Grand Junction, in said State; that all westbound traffic carried by this defendant to the City of Leadville and intermediate points, is carried wholly in the State of Colorado; that as to such traffic the same is not, by this defendant, transported from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States; that in the transportation of said traffic this defendant does not transport property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign

country to any place in the United States and carried from such place to a port of entry, either in the United States or an adjacent foreign country.

2. This defendant further alleges that the shipments described in said complaint were, by this defendant, received, transported, delivered and handled wholly within the State of Colorado, and that the same were not shipped to, or from, a foreign country from or to, the State of Colorado.

63 3. This defendant further alleges that as to said shipments it had no arrangement with The Missouri Pacific Railway Company for a through carriage or shipment thereof; that it did not carry same or any part thereof, upon through waybills or other through billing, but on the contrary alleges that said shipments, when brought to Pueblo, by The Missouri Pacific Railway Company were received by this defendant from such connecting carrier at Pueblo, in the same manner and subject to the same conditions and liable to the same rate as applies to persons or corporations dealing in the same commodity at Pueblo and shipping to the same destination, and that no discrimination whatsoever was made by this defendant as between shipments made by shippers at Pueblo and other Colorado common points, and shipments received from St. Louis and other eastern points from interstate connecting carriers at Pueblo and other Colorado common points.

Wherefore this defendant says that the shipments carried by it between Pueblo and Leadville, and described in said complaint, were not subject to, but were in fact expressly excluded from the provisions of the Act to regulate commerce and acts amendatory thereof and supplementary thereto.

64 Wherefore this defendant prays that this complaint may be dismissed as against this defendant.

Sixth Defense.

For a sixth and further separate answer and defense to the matters and things alleged in said complaint herein, this defendant says:

1. That the traffic mentioned and described in the complaint herein from St. Louis, in the State of Missouri, to Salt Lake City, in the State of Utah, is not conducted under circumstances and conditions substantially similar to the circumstances and conditions affecting the carriage of such traffic from said City of St. Louis to the City of Leadville, but that there exists at Salt Lake City a competition of carriers and of markets, important in character and extent, and controlling in amount, which, under the circumstances affecting the sev-

eral carriers reaching Salt Lake City, determines the maximum rate that may be charged upon such traffic for the transportation thereof from St. Louis and other eastern and northern points to Salt Lake City; that said competition of carriers and of markets does not exist at Leadville; that said competition at Salt Lake City is of such a character that it would influence and necessarily control the rate or rates to that point from St. Louis and said other eastern and northern points

even if there were no difference of mileage; but the controlling effect thereof in fixing rates is further emphasized by a radical difference of mileage in reaching Salt Lake City by the lines of different carriers from St. Louis and other eastern and northern points; that the mileage from St. Louis to Salt Lake City via the Union Pacific lines is 1450 miles; that the mileage from St. Louis to Salt Lake City via the Missouri Pacific Railway Company, The Denver and Rio Grande Railroad Company and The Rio Grande Western Railway Company is 1546 miles; the short line mileage being 96 miles less via the Union Pacific road, and that this defendant has not the benefit of, and its lines do not constitute a factor in, such short line mileage.

2. This defendant further alleges that the rate from St. Louis to Salt Lake City is controlled and determined by the short line mileage to Salt Lake City, operating under the other competitive influences of markets and carriers existing at Salt Lake City; that this defendant and its connecting carriers engaged in the transportation of traffic described in said complaint, from St. Louis to Salt Lake City, must, if they engage therein at all, meet such competition of markets and carriers and carry such traffic at the rate thereby fixed; that the rate thereby fixed, while not adequately remunerative to this defendant and its connecting carriers, nevertheless has the effect of substantially increasing the revenues of this defendant and enables it to make lower rates to intermediate points than it would be necessary to charge if it did not also participate in such through transportation to Salt Lake City.

3. This defendant further alleges that by reason of the very great dissimilarity of circumstances and conditions at Leadville, from those operating at Salt Lake City, and the absence of competitive conditions herein described, this defendant and its connecting carriers cannot, without material loss of revenue and unreasonable reduction of their compensation for the service rendered, determine the rate on said traffic to Leadville by the lower rate in effect to Salt Lake City.

4. This defendant denies that it, and its connecting carrier, have discriminated against, or are discriminating against the complainant, and denies that the rates to Leadville described in said complaint, or either of them, are unjust or unreasonable, or that the said rates, or either of them, subject the said complainant to unjust discrimination or undue or unreasonable prejudice or disadvantage, or otherwise, and denies that the rate or rates on the shipments described in said complaint, established by The Missouri Pacific Railway Company or
67 the local rate collected by this defendant, or that the sum of said rates constitutes greater compensation in the aggregate for the transportation of like kind of property, under substantially similar circumstances and conditions for a shorter distance than for a longer haul over the same lines in the same direction, the shorter being included within the longer distance, or that this defendant, or its connecting carrier has, or had, as to said traffic, in any respect, violated Section 1 or Section 4, or any other section of said Act to regulate commerce, or acts amendatory thereof or supplementary thereto.

5. This defendant alleges that the rates from St. Louis to Leadville are, in each case, made up of two factors: the first being the through interstate rate or rates from St. Louis to Pueblo, and the second being the local rate or charge made by the defendant for the transportation of the shipments described in said complaint on and over its own line, only from Pueblo where said shipments were, and are, received to the point of delivery of said shipments; that in each case in which the combined rates, consisting of the two factors aforesaid, to Leadville are in excess of a rate from St. Louis to Salt Lake City, such excess results solely from the relation which the
rate or rates from said St. Louis to Pueblo bears to the
68 rate or rates from St. Louis to Salt Lake City, and that this defendant has no interest in, or control over the rates from St. Louis to Pueblo or other Colorado common points.

6. This defendant further alleges that the rate or rates by it charged on its lines for the carriage of the shipments described in said complaint, from the time of the reception thereof at Pueblo to the time of the delivery thereof at Leadville, is, and are, reasonable and just, and that it has been the purpose of this defendant and its constant practice to maintain such rates only as the growth of the business involved justified, and a just and due regard to all interests would permit, and the peculiar circumstances and conditions surrounding and controlling transportation by rail through the mountainous territory involved justified.

Wherefore, and in view of the considerations aforesaid, this defendant says that said complaint should be dismissed as against it.

Seventh Defense.

For a seventh and further separate answer and defense to the matters and things alleged in said complaint herein, this defendant says:

1. That until about the 14th day of September, 1906, this defendant was not advised by the complainant, or otherwise, that the rate charged by it for the transportation of beer in carload lots from Pueblo to Leadville, or that the rate
69 paid by the complainant to The Missouri Pacific Railway Company for transportation of beer in carload lots from the City of St. Louis to the City of Leadville was, or was claimed by said complainant, or any other person or persons, to be excessive, unjust, discriminative or otherwise, in violation of either the letter or spirit of the Act to regulate commerce, or acts amendatory thereof and supplementary thereto, and that during all the time in said complaint described, from and after the 12th day of July, 1902, until the bringing of this action, the complainant herein continued to procure the transportation of the shipments described in said complaint by this defendant at a rate for such transportation from the City of Pueblo to the City of Leadville of 45 cents per hundred pounds, and without protest to this defendant against such rate, and that until the bringing of this action said complainant has never sought to secure the establishment of a through rate or joint rate on beer in carload lots from St. Louis to Leadville, or to have its local rate of 45 cents per hundred pounds declared illegal, unjust or discriminatory, or to obtain any other relief except that prayed for in its civil suit for damages brought in the United States Circuit Court for the District of Colorado, on or about the 14th day of September, 1906, which said suit was voluntarily dismissed by said
70 complainant, and that during all the time covered by the shipments described in said complaint, said complainant has acquiesced and concurred in the exaction and payment of said local rate of this defendant.

Wherefore by reason of the laches of said complainant in the premises, it is estopped, and ought to be barred, of any right to reparation herein or to other relief, and this complaint herein should be dismissed.

THE DENVER AND RIO GRANDE RAILROAD COMPANY,

By E. N. Clark, Its Attorney.

State of Colorado,
City and County of Denver—ss.

Fred Wild, Jr., being first duly sworn upon his oath says: that he is the General Freight Agent of the above named defendant The Denver and Rio Grande Railroad Company, and that he makes this verification of the foregoing answer for, and in behalf of, said defendant, and that the affiant has read the foregoing answer and knows the contents thereof, and that he is personally familiar with the matters and things therein set forth, and that the statements therein contained are true as he verily believes.

FRED WILD, JR.

71 Subscribed and sworn to before me this 23 day of May, 1907.

My commission expires Nov. 3, 1909.

(Seal)

GEO. PASQUELLA,
Notary Public."

Eighth Defense.

Defendant admits that it is, and was at the time mentioned in the petition herein, a corporation created and existing under and by virtue of the laws of the State of Colorado, having its principal office in the City of Denver, in said State, but specifically denies that the defendant and The Missouri Pacific Railway Company were, at the time or times specifically mentioned in said petition, or at any other time or times, or are common carriers engaged in the transportation of property by their several lines of railroad, under a common control, management or arrangement for continuous carriage or shipment from St. Louis, in the State of Missouri, to Leadville, in the State of Colorado, and specifically denies that during the time or times aforesaid, the defendant was, or is, subject to the provisions of the Act of Congress entitled, "An Act to regulate commerce," and the amendments thereto, with

72 respect to the transportation of the property and shipments in said petition specified, enumerated and set forth.

Ninth Defense.

1. The defendant admits that the Interstate Commerce Commission was created and established, and now exists, under and by virtue of an Act of Congress entitled, "An Act to regulate commerce", approved February 4, 1887, and the amendments thereto enacted by Congress.

2. The defendant admits that subsequent to the filing by the petitioner herein of its complaint before the Interstate Commerce Commission on or about the 6th day of May, 1907, as in said petition set forth, and subsequent to the filing of its separate answer to said complaint by the defendant before said Interstate Commerce Commission, as in said petition set forth, the said Interstate Commerce Commission proceeded to hold a hearing and investigation of, and with respect to, the matters and things set forth in the complaint so filed with said Commission by the petitioner herein, as aforesaid, but the defendant specifically and expressly denies that said Interstate Commerce Commission duly and legally held such hearing and investigation, and the defendant specifically and expressly denies that said Interstate Commerce Commission duly and legally assembled for the purpose of holding or conducting

73 such hearing and investigation before it, because at the time said Interstate Commerce Commission held or conducted such investigation and hearing, said Interstate Commerce Commission had no jurisdiction of the matters and things set forth in the complaint so filed by the petitioner herein before said Commission on or about the 6th day of May, 1907, as aforesaid, so far as the same affected or pertained to the defendant herein, and because at the time aforesaid, said Interstate Commerce Commission had no jurisdiction, power or authority, under and by virtue of said Act of Congress entitled, "An Act to regulate commerce," and the various Acts of Congress amendatory thereto, to conduct said investigation and hearing and to consider and pass upon the matters and things set forth in said complaint so filed before it by the petitioner herein on or about the 6th day of May, 1907, as aforesaid.

Tenth Defense.

1. The defendant says that it has neither knowledge nor information sufficient upon which to base a belief whether or not it was made to appear to the satisfaction of the said Commission at the hearing held by said Commission upon the complaint so filed before it by the petitioner herein on or about the 6th day of May, 1907, and the separate answers thereto filed by the defendant herein and The Missouri Pacific Railway Company, that the defendants named in said com-

74 plaint, so filed before the Interstate Commerce Commission by the petitioner herein, and particularly the defendant herein, had violated the provisions of said Act of Congress entitled, "An Act to regulate commerce," in certain respects.

2. The defendant specifically and expressly denies that the Interstate Commerce Commission, on the 6th day of April,

1908, or at any other time, duly and legally determined the matters and things in controversy and at issue between the petitioner herein and The Missouri Pacific Railway Company and this defendant, as set forth in the complaint filed before said Interstate Commerce Commission by the petitioner on or about the 6th day of May, 1907, and the separate and several answers to said complaint thereafter filed before said Commission by said The Missouri Pacific Railway Company and the defendant herein; and further specifically and expressly denies that at said time or at any other time or times said Interstate Commerce Commission ever had jurisdiction, power or authority, under and by virtue of said Act of Congress entitled, "An Act to regulate commerce," and the various Acts of Congress amendatory thereof, to hear and determine the matters and things then at issue between said petitioner and the defendant herein.

Eleventh Defense.

1. The defendant admits that on the 6th day of April, 75 A. D. 1908, the Interstate Commerce Commission formulated and promulgated an order, or alleged or purported order, directing the defendant herein to pay to the petitioner herein, on or before the first day of June, 1908, the sum of three thousand four hundred thirty eight dollars and twenty seven cents (\$3438.27), with interest thereon at the rate of six per cent per annum from May 6, 1907, as in said petition set forth; and the defendant further admits that thereafter the said Interstate Commerce Commission caused to be furnished to the defendant herein a copy of said order, or alleged or purported order, and of a certain report of the said Interstate Commerce Commission referred to in said order, but the defendant specifically and expressly denies that a duly authenticated copy of said order, or alleged or purported order, and of said report was ever delivered to the defendant herein agreeably to the provisions of the law in that regard.

2. The defendant specifically and expressly denies that said order or alleged or purported order of said Interstate Commerce Commission is now, or ever has been, at any time, in full force and effect, and on the contrary avers and alleges that said order, or alleged or purported order, is unlawful, null and void, and further avers and alleges that said Interstate

Commerce Commission did not have, on the 6th day of 76 April, 1908, or at any other time or times, power or authority under and by virtue of the said Act of Congress entitled, "An Act to regulate commerce," and the various acts of Congress amendatory thereof, or under and by virtue of any other existing statute or statutes, law or laws to formu-

late, promulgate and issue such order, or alleged or purported order.

3. The defendant further specifically and expressly denies that it ever transported 2,292,178 pounds of beer, or any other amount or amounts of beer, from Pueblo, Colorado, to Leadville, Colorado, as part of a through transportation from St. Louis, Missouri, to said Leadville.

4. The defendant further specifically and expressly denies that it ever made excessive and unreasonable charges to the petitioner herein, or to any other person or persons, firm or corporation, for the transportation of 2,292,178 pounds of beer, or any other amount or quantity of beer from Pueblo, Colorado, to Leadville, Colorado.

5. The defendant admits that it did not comply with said order, or alleged or purported order, of the said Interstate Commerce Commission within the time limit named in said order, and avers and alleges that said order, or alleged or purported order, is null, void and of no effect, and that said Interstate Commerce Commission had no power or authority
77 under and by virtue of the Act of Congress entitled, "An Act to regulate commerce", and the various Acts of Congress amendatory thereof, to make, formulate, promulgate and publish such alleged or purported order, or to require the defendant to pay to the petitioner herein the sum of three thousand four hundred thirty eight dollars and twenty seven cents (\$3438.27), with interest thereon at the rate of six per cent per annum from May 6, 1907, as the defendant is sought to be required to do under the terms of said order, or alleged or purported order.

Thirteenth Defense.

The defendant specifically and expressly and generally denies all of the matters and allegations in and of the petition herein, except such as are hereinbefore expressly admitted, or with respect to which the defendant has neither knowledge nor information sufficient upon which to base a belief, as hereinbefore set forth.

Wherefore, having fully answered all matters and things contained or set forth in the petition herein, the defendant respectfully prays that it may go hence with its reasonable costs.

THE DENVER AND RIO GRANDE
RAILROAD COMPANY,

By E. N. Clark and T. L. Philips,
Its Attorneys.

78 State of Colorado,
City and County of Denver—ss.

Fred Wild Jr., being first duly sworn upon his oath says: that he is the General Freight Agent of the above named defendant The Denver and Rio Grande Railroad Company, and that he makes this verification of the foregoing answer for, and in behalf of, said defendant, and that the affiant has read the foregoing answer and knows the contents thereof, and that he is personally familiar with the matters and things therein set forth, and that the statements therein contained are true as he verily believes.

FRED WILD, JR.

Subscribed and sworn to before me this 21st day of September, 1908. My commission expires November 3, 1909.

(Notarial Seal)

GEO. PASQUELIA,
Notary Public.

Endorsed: No. 5180. In the Circuit Court of the United States, for the district of Colorado. The Baer Brothers Mercantile Company, vs. The Denver and Rio Grande Railroad Company. Answer, Filed Sept. 24, 1908. Charles W. Bishop, Clerk.

79 In the Circuit Court of the United States for the
District of Colorado.

The Baer Brothers Mercantile Company, Petitioner,
vs.

The Denver and Rio Grande Railroad Company, Defendant.

Replication.

Comes now The Baer Brothers Mercantile Company, petitioner in the above entitled cause, by William B. Harrison, its attorney, and files this its replication to the answer of the defendant herein and says:

I.

For reply to the first defense in said answer contained, petitioner denies generally and specifically each and every allegation of new matter set up in said first defense, except such as is hereinafter expressly admitted.

Further replying to said first defense, petitioner admits that freight traffic from St. Louis, and from Pueblo, destined to Grand Junction and Salt Lake City, passed and passes through Malta Junction, a point on defendant's main line, at a distance of 4.82 miles from said city of Leadville, and admits that the handling of freight traffic in carload lots between

80 Pueblo and Leadville involves switching at Malta Junction, and an additional haul of 4.82 miles, but as to whether or not such additional haul is over a track characterized by steep grades and other peculiar difficulties, this petitioner has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Further replying to said first defense, petitioner admits that other lines of transportation from St. Louis to Leadville were available to petitioner during the time covered by the shipments in controversy, but petitioner alleges that by arrangement between the defendant and the carriers controlling and operating such lines of transportation, the rate or charge for the transportation of beer in carload lots from St. Louis to Leadville was during the time covered by the shipments of beer in controversy, the same over each and all of such lines as the rate or charge over the lines of the defendant and The Missouri Pacific Railway Company, and petitioner alleges that without paying such rate or charge it was not possible for petitioner to have the shipments described in the petition herein, transported over any of said lines, from the city of St. Louis to the city of Leadville.

Further replying to said first defense, petitioner admits that during the time covered by the shipments of beer in question the defendant's local rate or charge for the transportation of beer in carload lots from Pueblo to Leadville was 45 cents per hundred pounds and admits that defendant received
81 from The Missouri Pacific Railway Company 45 cents for each hundred pounds of beer contained in the shipments made subsequent to the 12th day of July, 1902, but alleges that the amount so received by defendant was its share of the through rate charged and collected by The Missouri Pacific Railway Company, for the through transportation of said beer from St. Louis to Leadville.

II.

For reply to the second defense contained in said answer petitioner denies generally and specifically, each and every allegation of new matter set up in said second defense, except such as is hereinafter expressly admitted.

Further replying to said second defense, petitioner admits that it instituted the action at law against the defendants and The Missouri Pacific Railway Company in the manner and form and for the purposes stated in its amended complaint set out on pages 12 to 21, inclusive, of said answer, except that in the copy of said amended complaint, incorporated in said answer, a part of paragraph four of the second cause of action,

stated in said amended complaint, is omitted, the part so omitted being in the words and figures following:

And that on the 13th day of May 1904, the rate or charge so established and published and in force, was and ever since said last named date, has been 90 cents for each hundred pounds of beer in gross transported, as aforesaid.

82 And petitioner further admits that the defendant herein demurred to said complaint upon the ground that the same did not state facts sufficient to constitute a cause of action against the defendants thereto.

And further replying to said second defense, petitioner alleges the facts to be that there was no hearing or argument on said demurrer, but that at the time set for hearing thereon counsel for defendant called the court's attention to and read to the court, the advance sheet of a certain decision about that time handed down by the Supreme Court of the United States, and insisted that under said decision the court had no jurisdiction of the causes of action stated in said amended complaint, and that said complaint should be dismissed, whereupon the court advised petitioner that it would be obliged to dismiss the complaint for want of jurisdiction and after taking time by leave of court, to consider the effect of said Supreme Court decision, and having concluded that under said decision the court had no jurisdiction of the causes of action, stated in its said amended complaint, and for the purpose of having it appear of record that there was no ruling on said demurrer and no decision on the merits of the case, petitioner asked the court to dismiss said amended complaint at its cost, without prejudice to the right of petitioner to again institute its suit upon the same
83 cause of action in any court of competent jurisdiction, and the order of dismissal was so entered of record.

Wherefore petitioner says that defendant should not now be permitted to say that petitioner had made an election or that petitioner had voluntarily dismissed said action.

III

For reply to the third defense in said answer contained, petitioner denies each and every allegation of new matter set up in said third defense, except such as is hereinafter expressly admitted.

Further replying to said third defense, petitioner admits all allegations of new matter set up in the first paragraph of said third defense; admits that the rates of the Missouri

Pacific Railway Company on beer in carload lots from St. Louis to Pueblo during the time covered by the shipments in controversy, were as stated in paragraphs 2, 3, 4, and 5 of said third defense and that said rates were published and filed with the Interstate Commerce Commission as stated in said paragraphs 2, 3, 4, and 5; admits that during the time covered by said shipments, the local rate of the defendant for the transportation of beer in carload lots from Pueblo to Leadville, was 45 cents for each hundred pounds of beer so transported, but whether or not said rate was never published or filed as an interstate rate or as part of an interstate rate, this petitioner has not and cannot obtain sufficient knowledge or information upon which to base a belief.

IV

For reply to the fourth defense contained in said answer, petitioner admits that section 2907 of Mills Annotated Statutes of the State of Colorado, is in the words set forth in said fourth defense, and further replying to said fourth defense, petitioner denies each and every allegation of new matter set up in said fourth defense, not herein expressly admitted.

V

For reply to the fifth defense contained in said answer, petitioner says that as to the new matters set up in said fifth defense, this petitioner has not and cannot obtain sufficient knowledge or information upon which to base a belief, and petitioner therefore denies generally and specifically each and every allegation of new matter contained in said fifth defense.

VI

For reply to the sixth defense contained in said answer, petitioner admits that the rate under which the shipments described in the petition herein moved was a combination of the rate of The Missouri Pacific Railway Company from St. Louis to Pueblo and the rate of the defendant from Pueblo to Leadville. That as to all new matters set up in said
85 sixth defense, not herein expressly admitted, this petitioner says that it has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore petitioner denies the same.

[VI]

For reply to the seventh defense in said answer contained, petitioner denies each and every allegation of new matter, set up in said seventh defense.

THE BAER BROTHERS MERCANTILE COMPANY

By Wm. B. Harrison

Its Attorney

State of Colorado,

City and County of Denver—ss.

William B. Harrison, being first duly sworn, on oath deposes and says:

That he is attorney for The Baer Brothers Mercantile Company, the petitioner in the above entitled action;

That he has read the foregoing replication and that the facts therein stated, are true, as he verily believes.

That he makes this affidavit for the reason that the proper officer of the said petitioner is absent from the state of Colorado.

WM. B. HARRISON

Attorney for Petitioner.

86 Subscribed and sworn to before me this second day of October, A. D. 1908.

My commission expires January 23rd, 1912.

(Notarial Seal)

MARIE L. ETCHEN,

Notary Public.

Endorsed: No. 5180. In the Circuit Court of the United States for the District of Colorado. The Baer Brothers Mercantile Company vs. The Denver & Rio Grande Railroad Company. Replication. Filed Oct. 2, 1908. Charles W. Bishop, Clerk. William B. Harrison, Attorney for Petitioner.

In the Circuit Court of the United States for the District of Colorado.

The Baer Brothers Mercantile Company, Petitioner,

No. 5180.

vs.

The Denver and Rio Grande Railroad Company, Defendant.

Special Bill of Exceptions.

Be it Remembered, That at the May term of the Circuit Court of the United States for the District of Colorado, holden within the City and County of Denver, in the State of Colorado, and said District, on the twenty-first day of September,

A. D. 1908, being one of the juridical days of said term, the Hon. Robert E. Lewis, Judge of said Court, presiding, the above entitled cause coming on to be heard, upon the
87 defendant's demurrer to the petition filed by the petitioner herein, the following proceedings were had, namely:

The defendant submitted its said demurrer, as the same appears of record herein, and particularly upon the ground that said petition does not state facts sufficient to constitute a cause of action against this defendant; which demurrer was overruled by the court, to which ruling of the court the defendant, by its counsel, then and there duly excepted.

Forasmuch as the above and foregoing proceedings, ruling and exception in this bill contained do not fully appear of record in this cause, the said defendant, The Denver and Rio Grande Railroad Company, tenders this its bill of exceptions by it reserved herein, and prays that the same may be allowed, signed and sealed by the Judge of this Court, and made a part of the record in this cause, pursuant to the statute in such case made and provided, which is accordingly done on this 5th day of October A. D. 1908.

ROBT. E. LEWIS, Judge.

Endorsed: No. 5180. The Baer Brothers Mercantile Company, vs. The Denver and Rio Grande Railroad Company. Special Bill of Exceptions. Filed Oct. 5, 1908. Charles W. Bishop, Clerk.

88 Twentieth Day, November Term. Saturday, November 28th, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

The Baer Brothers Mercantile Company,
5180. vs.
The Denver and Rio Grande Railroad Company.

Action on a money demand.

At this day comes the plaintiff by William B. Harrison, Esquire, its attorney, and the defendant by Thomas L. Philips, Esquire, its attorney, also comes.

And thereupon comes a jury, to-wit:

William P. Carstarphen, Jr.
Herbert S. Hitchman
Aaron Vandekerr
Armour C. Anderson
T. C. Hitchings
H. S. Decker

E. E. Forsythe
Walter Hough
Oscar E. Johnson
Gustave Anderson
John T. Curnell
Albert Neumann

twelve good and lawful men, and they are each duly selected and tried, empanelled and sworn to well and truly try the issues herein joined and a true verdict render according to the law and the evidence. And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court not to converse among themselves or with others touching this case, or the matters at issue herein, or the evidence heard, or any part thereof, nor to listen to such conversation of others are permitted to retire to meet the court at its next incoming.

Twenty-first Day, November Term. Monday, November 30th, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

The Baer Brothers Mercantile Company,
5180. vs.
The Denver and Rio Grande Railroad Company.
Action on a money demand.

At this day come again the parties to this case by their attorneys respectively. And the jurors heretofore duly empanelled and sworn in this case being now all here present and in the jury box, the trial of the issues herein joined is resumed.

And thereupon, at the close of the evidence produced herein on behalf of the petitioner and of the respondent;

It is ordered by the court that judgment be entered herein, as upon a verdict of the jury, in favor of the petitioner and against the respondent for the sum of three thousand seven hundred and sixty-one dollars and forty-five cents (\$3761.45), and that an attorney's fee of five hundred dollars (\$500) be, and the same is hereby, allowed to the attorney for the petitioner, and that the same be taxed as a part of the costs in this case.

90 Wherefore, it is considered by the court that the petitioner do have and recover of and from the respondent the sum of three thousand seven hundred and sixty-one dollars and forty-five cents (\$3761.45), together with its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

And thereupon, on motion of respondent, it is ordered by the court that it have day and to and including sixty (60) days from this day within which to file herein a bill of the exceptions reserved by it upon the trial of the issues herein joined, and supersedeas bond on writ of error shall be in the sum of six thousand dollars (\$6000).

Monday, November 30th, A. D. 1908.

The Baer Brothers Mercantile Company,
5180. vs.
The Denver and Rio Grande Railroad Company.

Action on a money demand.

On this thirtieth day of November, A. D. 1908, the same being one of the regular juridical days of the November Term, A. D. 1908, of this court; there being present the Honorable Robert E. Lewis, district judge;

It is considered by the court that the petitioner do have and recover of and from the respondent the sum of three thousand seven hundred and sixty-one dollars and forty-five cents (\$3761.45), together with its costs by it in this behalf
91 laid out and expended, to be taxed, and have execution therefor:

Twenty-fourth Day, November Term. Thursday, December 3rd, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of November, A. D. 1908.

The Baer Brothers Mercantile Company,
5180. vs.
The Denver and Rio Grande Railroad Company.

Action on a money demand.

At this day comes the defendant by T. L. Philips, Esquire, its attorney;

And thereupon, on his motion and pursuant to a written stipulation thereto herein filed;

It is ordered by the court that no execution issue herein for thirty (30) days after the thirtieth day of November, A. D. 1908.

92 United States of America,
District of Colorado—ss.

In the Circuit Court of the United States, for the District of Colorado. Sitting at Denver.

Baer Brothers Mercantile Company, Petitioner,
No. 5180. vs.

The Denver and Rio Grande Railroad Company, Defendant.

Defendant's Bill of Exceptions.

Be It Remembered, that on the twenty-eighth day of November, A. D. 1908, the same being one of the juridical days of the regular November A. D. 1908 term of the Circuit Court of the United States within and for the District of Colorado, sitting at Denver, Colorado, the above entitled cause came on for trial before the Honorable Robert E. Lewis, Judge of said court, the plaintiff appearing by William B. Harrison, Esquire, its attorney, and the defendant by Elroy N. Clark, Esquire, and Thomas L. Phillips, Esquire, its attorneys.

And thereupon the jury having been duly selected, empanelled and sworn to try the same, the plaintiff and the defendant to sustain the issues herein on their respective parts, introduced the following oral and documentary evidence, interposed the objections and took the exceptions hereafter noted, to-wit:

The defendant, by its counsel, objects to the introduction of any evidence by the petitioner under its petition herein, for the reason that said petition does not contain or set forth facts sufficient to constitute a cause of action against this defendant or to support this action in this court, or to confer jurisdiction upon this court to hear, try and determine this cause,
93 in this, that it nowhere appears in or from said petition that the Interstate Commerce Commission, prior to formulating and promulgating its order referred to and set forth in said petition, and for the enforcement of which this suit is instituted, as in said petition set forth, or in said order or at any other time or in any other manner ordered the defendant to change or reduce its schedule of rates which are in said petition alleged to be unreasonable, or that said Interstate Commerce Commission prior to formulating or promulgating such order or by said order or at any other time or in any other manner determined and prescribed what would be the just and reasonable rate or rates, charge or charges, to be

thereafter observed as the maximum to be charged in the place and stead of the rates and charges of the defendant complained of by the petitioner in its complaint before said Interstate Commerce Commission set forth in and made a part of its said petition herein, but on the contrary, it affirmatively appears from and by said petition that no such order was made or such rate or rates, charge or charges, were so prescribed by said Interstate Commerce Commission, and inasmuch as the defendant's demurrer to the petition herein was overruled without opportunity for argument, the defendant respectfully prays the court to permit it to now submit to the Court authorities and argument in support of this objection.

Objection overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Adolph Baer, being first duly sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Harrison:

The Court: Do you wish to rest on your prima facia case or make your whole case now?

Mr. Harrison: I will ask you a few preliminary questions of Mr. Baer in view of having comparative rates and then submit in evidence the report and order of the Commission; that is my case.

The Court: If you wish to offer any evidence in the case other than your prima facia case you will have to offer
94 it all now or rest upon the prima facia case, and offer evidence in rebuttal after the defendant has offered his case.

Mr. Harrison: I think that under the decisions either party has the right to supplement the order by offering evidence; I intend to formally introduce this after Mr. Baer has answered a few preliminary questions.

Mr. Clark: I do not understand whether that construction of the Court's is to be accepted by us as the order of this case or not; if it is I desire to interpose an exception to it.

The Court: I presumed you would: I want Mr. Harrison either to offer all or else rest upon a prima facia case with the right to offer evidence in rebuttal after the defendant has offered his case.

Mr. Harrison: I think I have a right to rely upon the findings of this report and order, or I have a right, if I think the Commission has omitted any proper comparison that ought to go into this record, or any other fact, to supplement it with such evidence; that is my idea. I will be very brief; and I have no doubt that the defendant has a right to introduce evidence in this case anyhow.

Q. Mr. Baer, what connection have you with the petitioner in this case, the Baer Brothers Mercantile Company?

A. I am president of the company.

Q. How long has your company been in existence?

A. Some nine years.

Q. These shipments were made by you, as the report of the Commission shows, from St. Louis, Missouri, to Leadville over the Missouri Pacific and the Denver & Rio Grande Railroad, and, as the report shows, which will be introduced in evidence, the freight charges were paid under protest, will you please state if that—

Mr. Phillips: Defendant objects to statements of this kind going into the record in this way, and move that any remarks of counsel which are not questions but which are argument be stricken from the record.

95 Mr. Harrison: That may go out.

Q. Will you please state if there was any other route by which this beer could be shipped from St. Louis to Leadville?

A. There were several; something like six or seven to Colorado common points; to Leadville all roads charge the same rate; the Burlington runs out of St. Louis; the Chicago and Rock Island, what is commonly known as the St. Louis and San Francisco, and their connection to Colorado Springs, Colorado, or Denver, Colorado, over the Colorado Midland, Denver & Rio Grande or Colorado & Southern; in each case the rate is the same.

Q. That is to say, the rate prevailing between St. Louis and Colorado common points is made up by a joint traffic agreement between those roads? A. So I understand.

Defendant, by its counsel, objects to the question as an assumption.

Q. That is your understanding?

A. That is my understanding, that it is an agreed rate; all have the same rate.

Q. Do you know as a matter of fact whether there was, at the time covered by these shipments in question, any agree-

ment between Colorado roads as to the rate between Denver and Pueblo and other Colorado common points and Leadville?

A. That was my understanding.

Defendant, by its counsel, objects to the question as immaterial and irrelevant and asks that the answer be stricken.

Objection sustained. Answer will be stricken.

Q. You have no knowledge, I suppose, except hearsay on that subject?

A. The only knowledge which can be considered as knowledge is the publications of that kind, signed by the different roads.

Q. Do you know whether the rate during all the time covered by these shipments, between St. Louis and Colorado common points was uniform and the same?

96 A. That is my understanding, that they always charge the same rates.

[—]. And that the rates between Colorado common points and Leadville were, at all the times covered by these shipments, the same?

A. Yes, the same rate.

Q. Do you know Mr. Baer, the distance and rate from Denver to Leadville?

A. The distance from Denver to Leadville?

Q. Yes. A. Possibly 270 miles.

Q. Over the Denver and Rio Grande?

A. Over the Denver and Rio Grande Railroad.

Q. What is the rate and distance from Denver to Grand Junction?

The Court: Now, at the present time?

Mr. Harrison: During the time covered by these shipments.

Defendant, by its counsel, objects to the question as it has not been shown that the rate is the same, or the circumstances or conditions the same.

Objection overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. What did you say the distance and rate was?

A. 436 miles, and rate 55 cents per hundred pounds, is my understanding.

Q. Over the Denver and Rio Grande?

A. The Denver and Rio Grande Railroad.

Q. Operates over that portion of the road that extends from Pueblo to Leadville? A. Yes, sir.

Q. Do you know, if so state, the rate and distance from Denver over the Rio Grande Railroad to Salt Lake City?

97 Defendant, by its counsel, objects to the question on the same ground as the last objection.

Objection overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

A. 725 miles, within a few miles.

Q. And the rate is?

A. Is 45 cents now; a part of the time fifty cents.

Q. During the time covered by these shipments?

A. Part of the time fifty and part of the time forty-five.

Q. Do you know, if so state, the rate and distance from Salt Lake to Grand Junction? Over the Rio Grande Western?

Defendant, by its counsel, objects to the question on the same ground.

Objection overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

A. The distance is 293 miles; the rate I am not positive but I think it was 40 cents.

Q. During the time covered by these shipments?

A. Yes, sir.

Q. Do you know during that time whether or not the officers of the Denver & Rio Grande Railroad Company and of the Rio Grande Western were the same?

A. I understand they were.

Q. The same president, same general freight agent?

A. Yes, sir.

Q. Do you know whether the board of directors of the two companies were the same?

Defendant, by its counsel, objects to the question as immaterial, incompetent and irrelevant.

Objection overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

A. I believe they were, but am not positive about that.

98 Q. Now, you have stated that the rate over the Colorado and Southern and the Midland from Denver to Leadville was the same as from Pueblo to Leadville, that is 15 cents? A. Yes, sir.

Q. It was the same during the time in question?

A. Yes, sir.

Q. What is the distance over the Colorado and Southern from Denver to Leadville?

A. I think something like 165 miles.

Q. And what is the character of the road as compared with the Denver & Rio Grande from Pueblo to Leadville?

A. It has much severer grades, harder to operate, running over two or three passes, or so-called divides, and a very much more expensive road to operate. It is a narrow guage road.

Q. You say it was a narrow guage road?

A. A narrow guage road.

Q. Then is it true on shipments originating at St. Louis, say, and taken by the Colorado and Southern from Denver to Leadville that they would have to break the shipment at Denver and reload?

A. Have to be reloaded from broad guage car to narrow guage car.

Defendant, by its counsel, objects to the question as incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. You filed a complaint, Mr. Baer, before the Interstate Commerce Commission against The Denver & Rio Grande Railroad Company and the Missouri Pacific Railway Company to recover excess charges on these shipments of beer set up in your complaint? A. Yes, sir.

99 Q. And what was the result of that complaint to the Commission?

A. The Commission decided that the rate was unreasonable, that the rate was 15 cents too high.

Defendant, by its counsel, objects as to what the report states.

Objection sustained.

Q. Was a report and order made in the case?

A. A report and order was made.

Mr. Harrison: I suppose that no further identification of this report and order will be required than the certificate of the Secretary of the Interstate Commerce Commission?

Mr. Clark: No, sir.

Plaintiff, by its counsel, offers in evidence the report and order of the Interstate Commerce Commission in No. 4060, Baer Brothers Mercantile Company vs. Missouri Pacific Railway Company and Denver & Rio Grande Railroad Company, submitted to the Commission December 30th, 1907, and decided April 6th, 1908, and ask to have the same marked Petitioner's Exhibit 1.

Cross Examination

By Mr. Phillips:

Q. Mr. Baer, you spoke on your direct examination about an agreement between railroad companies, that is between Colorado lines, did you not? You used that expression?

A. I used that expression.

Q. As a matter of fact, Mr. Baer, you don't know anything about that?

A. I only draw my conclusion from the signing of the tariffs, they show rates the same over those roads; the tariff is signed by the roads.

100 Q. You don't know how those tariffs are made up?

A. No.

Q. You stated, Mr. Baer, did you not, that the line or railroad from Pueblo to Grand Junction ran over the same road that the line to Leadville did? A. Yes, sir.

Q. Is that strictly true?

A. It is true with the exception of three and a half or four miles of road.

Q. Where is that road? A. Between Malta and Leadville.

Q. How far is that? A. About four miles.

Q. What sort of a road is it from Malta to Leadville?

A. A narrow gauge and broad gauge track.

Q. Do the trains that run through on the main line going toward Grand Junction run through Leadville?

A. No sir, they don't now.

Q. They didn't during any of the time covered by these shipments did they?

A. I am not certain; it is my impression that they didn't.

Q. During at least most of the time covered by these shipments the shipments were taken into Leadville on this side line from Malta? A. Yes, sir.

Q. Taken out of the train at Malta and over a very steep track from Malta to Leadville? A. Yes, sir.

Q. A good deal steeper grade than any of the rest of the line between Denver and Grand Junction, isn't it?

A. I don't know, there are some steep places.

Q. You don't know anything about the relative grades?

101 A. My impression is there is just as steep grades to Tennessee Pass as there is to Leadville; a very steep climb, about five hundred feet higher than Malta.

Q. Do you know what the elevation of Leadville is?

A. 10025 feet.

Q. Do you know what the elevation of Pueblo is, above sea level? A. Approximately 5000 feet.

Q. You spoke of the so-called South Park line, you mean by that the line of the Colorado and Southern Railroad Company running from Denver up Platte Canon? A. Yes, sir.

Q. Now you made some statements about the comparative grades and curvature of that and the Rio Grande, is it true that you actually know anything about the comparative grades and curvature of these two lines?

A. I don't know anything about the actual figures; I have ridden over the road and couldn't help to notice it.

Q. Do you know what the grades are on the South Park line? A. No sir, I do not.

Q. Do you know what the curvature is?

A. I couldn't give you that in figures.

Q. As a matter of fact that testimony of yours with regard to that is simply from your general observation in riding over that road, and further than that you don't know anything about it? A. Yes, sir.

Q. You are not a civil engineer, Mr. Baer? A. No, sir.

Q. The distance, you said, between Denver and Leadville on the so-called South Park line is about the same as 102 the distance from Pueblo to Leadville over the Denver and Rio Grande, is it?

A. I think a little in favor of the South Park, that is a little the longest.

Q. A trifle longer from Denver to Leadville than from Pueblo to Leadville?

A. About in the neighborhood of the same distance, something like ten or twelve miles difference.

Q. Now the distance from Denver to Leadville over the South Park, so-called, is a good deal shorter than it is from Denver to Leadville over the Denver and Rio Grande?

A. Yes, sir.

Q. It is even shorter than it is to Leadville over the Colorado Midland and its connections through Colorado Springs?

A. Yes, sir.

Q. And you said to your knowledge, during the time these shipments moved, the rate was the same on all of those lines?

A. Yes, sir.

Q. But the mileage on the South Park was 160 to 165 miles while the mileage on the Denver and Rio Grande was 270?

A. None of these shipments moved by Denver.

Q. I am asking you as to distances, that is what you testified to, wasn't it? A. Yes this is the distance.

Plaintiff reads Exhibit 1, being the report of the Interstate Commerce Commission, to the jury; said exhibit being in words and figures as follows, to-wit:

103

Petitioner's Exhibit 1.

Certified Copy.

Before the Interstate Commerce Commission.
No. 1060.

Baer Brothers Mercantile Company,

v.

Missouri Pacific Railway Company et al.

Submitted December 30, 1907. Decided April 6, 1908.

W. B. Harrison for complainant.

E. N. Clark for Denver & Rio Grande Railroad Company.

J. W. Preston for Missouri Pacific Railway Company.

Report and Order of the Commission.

Baer Brothers. Mercantile Co. v. Mo. Pac. Ry. Co. et al. 329

Certified Copy.

Baer Brothers Mercantile Company,

No. 1060. v.

Missouri Pacific Railway Company and Denver & Rio Grande Railroad Company.

Submitted December 30, 1907. Decided April 6, 1908.

1. A railroad company whose road lies entirely within the limits of a single state becomes subject to the act to regulate commerce by participating in a through movement of traffic from a point in another state to a point in the state within which it is located, although its own service is performed entirely within the latter state.

2. To maintain a petition before this Commission for the recovery of excessive freight charges it is not necessary that the payment of the freight should have been made under protest.

104 3. A rate of 45 cents applied to the transportation of beer from Pueblo to Leadville, which is part of a through transportation from St. Louis to Leadville, is excessive; such rate should not exceed 30 cents per 100 pounds. Reparation awarded.

4. The bringing of a suit in the United States circuit court for the recovery of excessive railway charges is not a bar to a subsequent proceeding before this Commission where that suit was dismissed without prejudice, and for the reason that the Commission had never passed upon the reasonableness of the rate involved.

W. B. Harrison for complainant.

E. N. Clark for Denver & Rio Grande Railroad Company.

J. W. Preston for Missouri Pacific Railway Company.

Report of the Commission.

Prouty, Commissioner:

The complainant is a corporation engaged in the liquor business at Leadville, Colo., which seeks by this petition to recover of the defendants damages on account of certain alleged unreasonable charges for the transportation of beer in carloads from St. Louis, Mo., to Leadville. The beer was transported at various times between July, 1902, and April, 1907. The rate under which it moved was a combination of the rate of the Missouri Pacific from St. Louis to Pueblo, which during a part of the period covered by this controversy was 50 cents per 100 pounds and during a part 45 cents per 100 pounds, and the rate of the Denver & Rio Grande from Pueblo to Leadville, which was during all the time 45 cents per 100 pounds, thus making a total rate during a portion of the period of 90 cents and during the remainder of 95 cents. The Complainant insists that this should not have exceeded 60 cents or at the most, under the circumstances of the case, 70 cents.

The beer was delivered by the Lemp Brewing Company to the defendant, the Missouri Pacific Railway Company, 105 at St. Louis, with instructions to transport the same to Leadville, Colo., for delivery to the complainant, and with the further instruction that shipments should be routed beyond Pueblo via the Denver & Rio Grande. At the time of receiving the shipment the Missouri Pacific in all cases issued to the Lemp Brewing Company a shipping receipt stating that the beer had been received by it for shipment to the order of the Baer Brothers Mercantile Company, Leadville, Colo. via the Denver & Rio Grande Railroad.

The freight upon the first shipment was paid by the complainant at Leadville to the Denver & Rio Grande Company. The complainant stated to the agent of that company that it regarded the rate as excessive and unlawful and declined to

pay the same except under protest, whereupon the agent of the Denver & Rio Grande accepted the amount of the freight and wrote upon the expense bill or receipt for such payment the words "paid under protest." In all other cases the freight was paid by the Lemp Brewing Company at the request of the complainant and on its account, and was by the instruction of the complainant paid under protest; and this fact in all cases with possibly one or two exceptions, was minuted upon the receipt given to the Lemp Company by the agent of the Missouri Pacific at the time of the payment of the money and the execution of the receipt.

The complainant and also the Lemp Brewing Company by the instruction of the complainant notified both the Missouri Pacific Company and the Denver & Rio Grande Company at some time before the bringing of the suit hereinafter referred to that these charges were considered unreasonable and made claim for refund. After considerable correspondence this claim was denied, and the complainants brought suit. Still later that suit was dismissed and this petition filed.

The shipment upon which the freight was paid at 106 Leadville to the Denver & Rio Grande by the complainant was transported by the Missouri Pacific from St. Louis to Pueblo and there delivered to the Denver & Rio Grande, which paid the Missouri Pacific its published rate for the transportation of the beer from St. Louis to Pueblo, treating the payment as an advance charge. The Denver & Rio Grande then transported the beer without further instruction from either the Lemp Brewing Company or the complainant from Pueblo to Leadville, and collected of the complainant both of its own charges from Pueblo to Leadville and the amount which it had advanced the Missouri Pacific.

All the other shipments were carried by the Missouri Pacific to Pueblo and there delivered to the Denver & Rio Grande for transportation to Leadville, the Missouri Pacific paying to the Denver & Rio Grande its charges for transportation from Pueblo to Leadville. In no case was any instruction given by the complainant or the Lemp Company or any person in their behalf as to the route or destination of the property, except what was given at St. Louis. Acting under these instructions and in the regular course of business, the beer was delivered at Pueblo to the Denver & Rio Grande and transported by that company to Leadville.

In point of fact the transportation from St. Louis to Pueblo was conducted by the Missouri Pacific upon a local way-bill, and that from Pueblo to Leadville was also conducted by the

Denver & Rio Grande upon a local waybill; but of this neither the Lemp Company nor the complainant had information. The complainant did know that the rate was made up by adding to the rate from St. Louis to Pueblo the local rate of the Denver & Rio Grande from Pueblo to Leadville.

The distance from St. Louis to Pueblo is about 923 miles, and the rate during the time covered by this investigation was sometimes 45 cents and sometimes 50 cents per 100 107 pounds. The complainant concedes that this was a just and reasonable charge for the performance of that part of the service. The distance from Pueblo to Leadville via the Denver & Rio Grande is about 160 miles, and the rate of that company between these points was during all the time 45 cents. The complainant insists that this rate was unjust, unreasonable and should not have exceeded 15 cents per 100 pounds.

During the entire period covered by these shipments there was in effect a joint rate between the Missouri Pacific and the Denver & Rio Grande on beer from St. Louis to Salt Lake City of 70 cents per 100 pounds under which that commodity was actually carried by the defendants. The route over which this rate applied was from St. Louis to Pueblo and from Pueblo to Salt Lake City via Malta Junction near Leadville. The complainant claims that under the fourth section of the act no higher charge should have been made for the transportation of this commodity to Leadville than was applied to Salt Lake City, a more distant point, and that he is entitled to reparation by the difference between the published rate to Salt Lake City and the rate which he paid to Leadville.

The defendant, the Denver & Rio Grande Company, insists that the transportation from Pueblo to Leadville, under the circumstances disclosed, was a purely local transaction entirely within the state of Colorado, and not, therefore, subject to the jurisdiction of this Commission; and this is the first question for decision.

The first section of the act to regulate commerce gives this Commission jurisdiction of any "common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water where both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States or the District 108 of Columbia to any other state or territory," etc. Since the transportation in question was entirely by railroads the words above inclosed in parentheses may be dis-

regarded. So reading the first section the defendants would be subject to our jurisdiction provided this transportation was from one state or territory to another state or territory.

This beer was carried from St. Louis in the state of Missouri to Leadville in the state of Colorado. Every party to the transaction so understood it. It was delivered to the Missouri Pacific for the purpose of being transported to Leadville. It was received and carried by the Denver & Rio Grande with full knowledge of the fact that that company was participating in a transportation from St. Louis to Leadville. If this was not a transportation of property wholly by railroad from a point in one state to a point in another state, it would be difficult to state a case of such transportation. If it be the kind of transportation defined by the first section, then both the Missouri Pacific and the Denver & Rio Grande by participating in that movement become subject to the act with respect to the transportation itself.

The defendant apparently concedes that Congress might have assumed jurisdiction over this movement from Pueblo to Leadville, but contends that it has not done so. It urges that the transportation performed by it is a local service entirely within the state of Colorado, which has been expressly excepted from the operation of the act by the terms of the proviso in the first section, which reads, "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory, as aforesaid."

109 The constitutional warrant for the act to regulate commerce is found in that provision which gives to Congress control over commerce with foreign nations and between the several states. It was evidently the purpose of Congress in the enactment of this statute to assume control of transportation, which is a part of commerce, in so far as it could lawfully do so, when that transportation was by railroad. The transportation over which Congress had control was of two kinds: (1) that between the states and territories, (2) that between the United States and foreign countries. The Federal Government had and could have no authority over transportation which began and ended in a particular state.

It would have control of transportation from the United States to a foreign country even when the movement in the United States was entirely within a single state. If, for example, traffic was taken up at Buffalo by the New York Cen-

tral and thence carried to New York City as a final destination, this service would be entirely within the state of New York and not subject to Federal control; but if that carriage was of property in transit from Buffalo to a foreign country, then it would fall within the purview of national supervision.

The purpose of the proviso was to make plain the exact extent of the jurisdiction of the Commission. When the transportation is wholly within a state that jurisdiction attaches, provided the carriage is part of a through movement to some foreign country. If the movement is from one state to another state the jurisdiction also attaches. The only instance in which the Commission has no jurisdiction is where the movement is entirely within the limits of a state and is not part of a movement to or from a foreign country.

The transportation in question, as we have already seen, was from the state of Missouri to the state of Colorado, and this was so understood and intended by the Denver & Rio Grande when it participated in the movement. This
110 being so, it is entirely immaterial that the part of the movement performed by the Denver & Rio Grande is entirely within the state of Colorado. The Daniel Ball, 10 Wall., 577.

We can have no doubt, therefore, that as this statute stands today the transportation and all railroads participating in that transportation are subject to the jurisdiction of the Commission.

Previous to the amendment of June 29, 1906, the words "or partly by railroad and partly by water, where both are used under a common control, management or arrangement for a continuous carriage or shipment," "were not inclosed in parenthesis, and the Federal courts inclined to the opinion that this language applied to carriers by railroad as well as to carriers by railroad and by water. When, therefore, a carrier operated entirely within a state, as does the Denver & Rio Grande in carrying this merchandise from Pueblo to Leadville, it was necessary to show not only a through interstate movement from St. Louis to Leadville, but also that the Denver & Rio Grande had entered into some arrangement for a continuous carriage or shipment. Most of the shipments in question occurred while the law stood in this form, and it may be that if we could have exercised no jurisdiction over this road from Pueblo to Leadville previous to August 28, 1906, we have no authority now to inquire, with respect to shipments which moved prior to that date, whether the rate charged was or was not reasonable. It is not deemed necessary to decide this

question, since it seems clear that even as the statute read previous to the taking effect of the above amendments, the Denver & Rio Grande was subject to our jurisdiction as to these shipments under the circumstances disclosed in this record.

The case shows that the Missouri Pacific and Denver & Rio Grande had in effect joint rates for the transportation of beer from St. Louis to Salt Lake City, and that these rates applied over the same route by which this beer was carried from St. Louis to Leadville. The Denver & Rio Grande during all the time covered by these transactions habitually received from the Missouri Pacific at Pueblo, in regular course of business, freight of all kinds destined to Leadville and similar points, and did also, during all this time, receive freight at points like Leadville for transportation via Pueblo and the Missouri Pacific to eastern destinations outside of the state of Colorado. It maintained at Pueblo facilities for the regular interchange of this business in order that the shipment might be a continuous one. By arrangement with the Missouri Pacific when it received freight from that company at Pueblo it advanced the charges of the Missouri Pacific Company up to that point, and, vice versa, when it delivered freight taken up by it at interior Colorado points to the Missouri Pacific it received from that company its own charges up to Pueblo. We think it perfectly clear that this course of business would amount to an "arrangement" within the meaning of the first section.

But the Supreme Court of the United States has decided this question in the Social Circle case, and it is sufficient to refer to that decision without further discussion. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S., 184. The Cincinnati, New Orleans & Texas Pacific Railway extended from Cincinnati to Chattanooga; the Western & Atlantic Railway from Chattanooga to Atlanta, and the Georgia Railroad from Atlanta to Augusta. Social Circle is located upon the Georgia Railroad between Atlanta and Augusta. The three railroads established a joint through rate for the transportation of merchandise from Cincinnati to Augusta. The Cincinnati, New Orleans & Texas Pacific Railway and the Western & Atlantic Railway established a joint through rate from Cincinnati to Atlanta, which was the same as the joint rate of the three to Augusta. Merchandise from Cincinnati to Social Circle was transported under the joint rate to Atlanta plus the local rate from Atlanta to Social Circle, thus making a higher rate to Social Circle than to Augusta.

The Commission ruled that the defendants should make no higher charge for the transportation of merchandise to Social Circle than was made to Augusta, a point beyond Social Circle on the same line. This order was resisted by the carriers upon the ground that the Commission had no jurisdiction over the transportation from Atlanta to Social Circle, since that was conducted by the Georgia Railway entirely within the state of Georgia.

It will be seen that this case was exactly analogous to the one at bar. We have here an interstate rate up to Pueblo and a state rate from Pueblo to Leadville. We have a joint rate from St. Louis to Salt Lake City via this same line. The Georgia Railway moved traffic from Atlanta to Social Circle upon a local waybill and had instructed its connections that it would insist on treating the carriage from Atlanta to Social Circle as a local proposition. The Supreme Court held that the movement from Cincinnati to Social Circle fell under the jurisdiction of the Commission as the law then stood. This case is decisive of the one before us, and upon the strength of it we hold that both under the present act as amended June 29, 1906, and under the act as it existed previous to these amendments this entire movement from St. Louis to Leadville, and the Denver & Rio Grande as a participant in that movement, were subject to our jurisdiction.

It would be certainly a most remarkable conclusion to hold that the Denver & Rio Grande by some instruction to its connection, or by some billing arrangement upon its own line, could exempt traffic to Leadville from the operation of
113 Federal control, and could subject traffic to stations upon either side of Leadville to that control.

The complainant insists that Leadville is an intermediate point upon the line of these defendants between Salt Lake City and St. Louis, and that they are therefore in violation of the fourth section in charging rates of 90 and 95 cents to Leadville, when their charge to the more distant point is but 70 cents. The defendants deny that Leadville is an intermediate point within the meaning of the fourth section, and further claim that, should it be held to be intermediate, circumstances and conditions are so different at Salt Lake City as to justify the lower charge for the longer haul.

Formerly the main line of the Denver & Rio Grande ran through the city of Leadville and both its passenger and freight trains were operated through that city. Subsequently, however, the route was changed and the main line now runs, and has run during the period involved in this case, through

Malta Junction. Leadville is about $4\frac{1}{2}$ miles from Malta Junction, some 700 feet higher, and the Denver & Rio Grande operates a branch line between these points.

Under these circumstances we are inclined to hold that Leadville should not be treated as intermediate, within the meaning of the fourth section. A town might be intermediate, although located some short distance from the line of the railway, so that the railroad did not literally pass through it; but when, as in this case, a town is connected with the main road by a branch road, requiring a separate and independent service at considerable cost to reach it, it ought not to be regarded as intermediate. The idea of the statute seems to be that where the transportation is conducted through a point, the cost of service to that point cannot be greater than the cost to the more distant point, and the charge shall be no more.

Now, it is evident in this case that the cost of transporting passengers or property to stations a considerable distance beyond Malta Junction might be materially less to the defendant than the cost of taking that traffic out of its regular trains and elevating it 700 feet over a distance of $4\frac{1}{2}$ miles. In our opinion, the fourth section can not be said to apply, owing to the location of Leadville, and this renders it unnecessary to consider the existence of the alleged competition at Salt Lake City, which is relied upon by the defendants in justification of the lower rate. It should be noted that the complainant raises no question of discrimination under the third section.

The only remaining question is one of fact upon the reasonableness of these charges. The complainant concedes that the rate of the Missouri Pacific from St. Louis to Pueblo, which was sometimes 45 cents and sometimes 50 cents, was not excessive, but claims that the charge of the Denver & Rio Grande of 45 cents for transporting this beer 160 miles was unjust and unreasonable.

The main line of the Denver & Rio Grande runs from Pueblo to Grand Junction, through a mountainous section. Its original construction was difficult and expensive, and its cost of operation is high. The density of traffic upon its main line is about the average for the whole United States. For the year ending June 30, 1907, its gross earnings were \$8,484.50 per mile and its net earnings \$3,078.93 per mile upon the entire system, and must have considerably exceeded that upon its main line and main-line branches. It has a funded indebtedness of about \$35,796 per mile and a stock issue of \$28,481 per mile, of which something more than one-half is preferred. For the last six years it has paid a dividend of 5 per cent upon

its preferred stock, and, in addition, has shown a considerable annual surplus, which has been invested in the improvement of the property. Its average receipts per ton-mile upon all business for the year ending June 30, 1907, were 1.346 cents, and it was operated for 63.71 per cent of its earnings.

It can not be said, certainly, that the financial condition of this system is such as to justify the imposition of rates
115 otherwise extravagant and excessive. Generally speaking, beer is transported at low rates. The rate from the Missouri River to Denver, 538 miles, is 30 cents; from Denver to Salt Lake City, over the line of the Denver & Rio Grande, a distance of 742 miles, the rate is 50 cents. It has been already said that from St. Louis to Salt Lake City, during most of the time covered by this proceeding, these defendants have maintained a rate of 70 cents for a distance of 1,547 miles. Between Chicago and Omaha, 500 miles, a rate of 22 cents applies. A rate of 45 cents for 160 miles is something over five cents per ton-mile. We do not think there is anything in the circumstances of this transportation, or in the financial condition of the defendant, the Denver & Rio Grande, which can justify the imposition of that charge in the transportation of this commodity. In our opinion, 30 cents per 100 pounds, in carloads, from Pueblo to Leadville, is sufficient as applied to this movement. It must be borne in mind that this is part of a through haul and that the charge for this portion might well be less than would be reasonable for a purely local service over the same distance.

We find, therefore, that the Denver & Rio Grande has exacted from the complainant charges in excess of what would be just and reasonable by the amount of 15 cents per 100 pounds. The total shipments upon which the complainants paid these higher rates and on account of which it is entitled to recover this 15 cents per 100 pounds aggregated 2,292,178 pounds. We therefore find that the Denver & Rio Grande Railroad Company has collected of the complainant the sum of \$3,438.27 in excess of just and reasonable charges for the transportation of this beer.

The Denver & Rio Grande Company insists that these payments by the complainant were made voluntarily and that therefore no recovery can be had. At common law a payment voluntarily made with full knowledge of the facts could not be recovered, and this principle has been applied to the payment of railway charges. It seems to have been generally held that in order to lay the foundation for the recovery of money

116 paid a common carrier by rail upon the ground that the charge was excessive the payment must be under protest, otherwise the carrier might assume that it was voluntary.

The act to regulate commerce provides that all rates shall be just and reasonable, and lays upon carriers the duty of maintaining rates which are just and reasonable. That act further provides that any person damaged by breach of its provisions may apply to the Commission and obtain an order for the payment of whatever damages have been sustained through failure to observe the law. Under this provision of the act the Commission has in the past awarded damages in the nature of reparation by the amount of the difference between the rate paid, when that rate was found to be excessive, and what would have been a reasonable rate. We have never held, nor do we think, that a protest made at the time of the payment of the freight money is a necessary prerequisite to the maintaining of a petition before this Commission for the return of unreasonable charges exacted. It may be true that the requirement of the first section that charges for interstate transportation of persons or property shall be just and reasonable is only declaratory of the common law, but when the statute goes further and prescribes the means and the manner in which infractions of this provision may be prosecuted, it is fairly inferable that had it been the intention of the legislator to require a preliminary protest this requirement would have been embodied in the statute itself.

The statute now prescribes the duty and provides that for a breach of that duty an action will lie. How can it be assumed that such action can only be maintained in those cases where the excessive charge has been paid under formal protest at the time of its payment? It may well be said that shippers ought not to be permitted to pay these charges without objection during considerable periods of time and afterwards claim damages on the ground that they were excessive. Such a case would present a question of good faith and of acquiescence which might properly be disposed of upon that ground, but that is not at all the question presented here.

117 In *Knudson-Ferguson Fruit Co. v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 149 Fed. Rep., 973, the circuit court of appeals for the seventh circuit held that no recovery could be had because the payment had been voluntarily made. The charges involved were for icing. The complainant insisted that it was the duty of the carrier to furnish ice as an incident to the transportation without the making of any additional charge to its published tariff, and

sought to recover what had been paid for the icing of a car-load of fruit. Soon after receiving the shipment the complainant paid to the defendant the charges for the freight and icing without objection, and the court was of the opinion that under these circumstances the payment must be treated as voluntary, and that no recovery could be had, even though the charge for the icing itself was in fact unlawful.

It is not clear that this case would be decisive of the question before us. Here the proceeding is brought for a violation of the statute and according to the provision of the statute; there the suit was for failure upon the part of the defendant to discharge its common-law duty. But assuming that the principle of that decision would include the case under consideration, we still feel that we ought not to follow it. The question is one of very great practical importance. It has never been passed upon by the Supreme Court of the United States. If we deny reparation upon this ground, the complainant apparently has no appeal from our decision. While ordinarily the decision of the circuit court of appeals would be regarded as controlling by this Commission, in the present instance we deem it our duty to follow our own judgment in awarding the reparation.

The Supreme Court of the United States has held that the reasonableness of railway charges where the question of reparation is involved must be first passed upon by this Commission, and this decision rests largely upon the ground that in no other way can the act to regulate commerce be so applied as to prevent confusion and gross discrimination between shippers. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. If it should be finally determined that a protest must be made at the time of payment of the freight money in each case, the result would be the grossest discrimination. A shipper paying under protest without the knowledge of other shippers might thus obtain the right to recover these charges while all other persons were debarred from that privilege during the period covered by the protest.

It should be noted that the complainant in this case has attempted to make with respect to each of the shipments involved a specific protest. The freight upon the first shipment was paid to the Denver & Rio Grande and was under protest. Upon all subsequent shipments the freight was prepaid by the Leup Brewing Company on account of the complainant and was under formal protest in nearly every instance. If, therefore, a protest to the Missouri Pacific upon prepayment of the freight charges is to be construed as a protest to the Denver

& Rio Grande, then the complainant has in fact paid the freight on these shipments under protest.

Ordinarily if property is delivered to a railroad destined to a point beyond the line of the receiving carrier the duty of that carrier is to transport the freight to the point of connection with the next railroad and deliver it to such carrier for transportation beyond. In that case the receiving carrier would probably be regarded as the agent of the shipper in making delivery, and if the freight charges had been prepaid by the shipper and the receiving carrier paid these charges to the connecting carrier, the receiving carrier would be, in the making of this payment, the agent of the shipper and not the agent of the connecting carrier. In the present case, if there were no through route and no arrangement for the handling of this through business, it would seem clear that the Missouri Pacific in passing over this freight money to the Denver & Rio Grande should be regarded as the agent of the shipper and not as the agent of the Denver & Rio Grande. We are inclined to think, however, that when two carriers enter into an arrangement like that which existed between the defendants in this case under which freight is handled over their respective

lines as a continuous shipment, under which charges
119 are both advanced and received, these carriers can not be regarded as entirely independent and distinct entities, as they would be under the common law, but must be held to have assumed certain relations with respect to one another and with respect to the traffic which they handle. We are inclined to hold, as a matter of fact, upon the record presented that the Missouri Pacific was the agent of the Denver & Rio Grande in receiving these prepaid charges, and that therefore the complainant did, as a matter of fact, make each separate payment under protest.

The freight upon the first shipment was clearly paid under protest. It may be finally held that the freight upon the other shipments was not and that a protest is necessary. Hence, for the purpose of protecting the rights of the parties in subsequent proceedings in court, we state the amount of the first shipment by itself, which was 30,090 pounds, giving \$15.14 collected by the defendant, Denver & Rio Grande Railroad Company, in excess of a reasonable charge for the service. This complaint was filed May 6, 1907.

Becoming satisfied, after considerable correspondence with the defendants, that no adjustment of its claim could be secured, the complainant did, on September 14, 1906, begin suit

against the defendants in the United States circuit court for the district of Colorado to recover the alleged excessive freight charges. After the filing of this suit, but before a trial, in consequence of the decision of the Supreme Court of the United States in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, supra, the complainant asked leave to dismiss said suit, and the same was dismissed by the court without prejudice on May 2, 1907.

The defendant insists that the complainant is precluded by the bringing of that suit from maintaining the present proceeding before the Commission, for the reason that by bringing the suit it exercised an election under the ninth section to proceed in court, and, therefore, by the terms of that section, lost its right to proceed by petition before the Commission. But it is plain that under the above decision the complainant never had a right to proceed before the court and could not, therefore, exercise an election or lose, by attempting to elect, its right to proceed before this body.

120 An order should issue directing the Denver & Rio Grande Railroad Company to pay the complainant the sum of \$3,438.27, with interest from May 6, 1907.

The prayer of the complaint is, among other things, that the Commission fix "a just rate for the through transportation of beer in carload lots from said city of St. Louis to said city of Leadville." There is no suggestion either in the complaint or in the prayer looking to the establishment of a joint rate, and that subject was not referred to either upon the trial or in the argument. This being so, we ought not to establish a joint through rate, and we do not think that we should undertake by our order to fix in this proceeding the locals which will make up the charge for the through movement in the future. There has been no practical difficulty in making these shipments over this route in the past. If the Denver & Rio Grande does not reduce its charge in accordance with this report, or if suitable through facilities are denied, the complainant can file its petition asking the establishment of a joint through route and rate.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of April, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

Baer Brothers Mercantile Company,
No. 1060. v.

Missouri Pacific Railway Company and Denver & Rio Grande
Railroad Company.

121 This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendant, the Denver & Rio Grande Railroad Company, be, and it is hereby, notified and required to pay unto the complainant, the Baer Brothers Mercantile Company, of Leadville, Colo., on or before the 1st day of June, 1908, the sum of \$3,438.27, with interest thereon at the rate of 6 per cent per annum from May 6, 1907, as reparation for excessive and unreasonable charge for the transportation of 2,292,178 pounds of beer from Pueblo, Colo., to Leadville, Colo., as part of a through transportation from St. Louis, Mo., to said Leadville, as more fully and at large appears in the report of the Commission in this case.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled Report and Order of the Commission are true copies of the originals now on file in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission, this 18th day of November, 1908.

(Seal of)

(Interstate)

(Commerce)

(Commission.)

E. A. MOSELEY, Secretary.

122 Petitioner rests.

The Court: Is there proof of service of a copy of the order of the Commission on the defendant?

Mr. Harrison: I think that is admitted by the answer and conceded to be a fact.

It is admitted that the defendant was served with a copy of this report and order by the Commission.

And thereupon the defendant, by its counsel, moved the Court for a directed verdict for the following reasons, to-wit:

1. That the petitioner has failed to prove that it has any right under the statutes and laws of the United States of America to maintain this action, and especially that the petitioner has failed to prove that the rates complained of by the petitioner in its petition herein have been changed according to law, or were so changed according to law prior to or contemporaneously with the promulgation of the alleged order of the Interstate Commerce Commission, set forth in the petition herein, and for the enforcement of which alleged order this suit was instituted.

2. That the Interstate Commerce Commission had no jurisdiction over the defendant herein with respect to the shipments enumerated in the petition herein, or either or any of them, for the reason that with respect to such shipments and each and every of them the defendant herein was not engaged in interstate commerce within the meaning of the act of Congress entitled, "An Act to Regulate Commerce," approved February 4, 1887, and the various acts of Congress amendatory thereof and supplemental thereto.

Motion denied.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

And thereupon court adjourned to Monday, November 30th, A. D. 1908, at ten o'clock a. m.

123 Monday, November 30th, A. D. 1908, court met at the hour of ten o'clock a. m., pursuant to adjournment.

And thereupon the defendant, to sustain the issues herein in its behalf, gave in evidence as follows:

Thomas P. Adams, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. You may state your name, age, residence and occupation?

A. Thomas P. Adams; St. Louis, Missouri; 52; local freight agent of the Missouri Pacific Railway Company at St. Louis, Missouri.

Q. This is a case, Mr. Adams, regarding the freight charges on seventy-six carloads of beer made from the Lemp Brewing Company of St. Louis, Mo., to Bear Brothers Mercantile Company at Leadville, between the dates of July 12, 1902, and March 16, 1907; you may state if you have any knowledge of these shipments?

A. Yes sir, the shipments were made from St. Louis.

Q. Made over the line of the railroad for which you were local agent? A. Yes, sir.

Q. Will you please explain to the jury the manner in which these shipments were made, that is the way in which the shipments came into the possession of the Missouri Pacific Railway Company?

A. Were delivered to the Missouri Pacific by the W. J. Lemp Company for transportation over their line to Pueblo. The shipments were tendered to us upon shipping orders of the W. J. Lemp Brewing Company, and waybilled from those shipping orders by St. Louis station to Pueblo.

Q. Who loaded the beer into the cars?

A. W. J. Lemp Brewing Company.

124 Q. Where was this loading done?

A. At the plant of the W. J. Lemp Brewing Company.

Q. What then would be the first thing that the Missouri Pacific Railway Company would know in regard to these shipments?

A. The delivery of the car to them with the shipping order of the W. J. Lemp Brewing Company.

Q. I will show you a package of papers and ask you to state what they are?

A. They are the shipping orders tendered by the Lemp Brewing Company.

Q. Are those the shipping orders covering the seventy-six cars of beer in this case?

A. The shipping orders are all here with the exception of one car.

Q. Will you kindly examine those papers again and state whether or not all of the shipping orders are there?

A. Yes sir, I notice the shipping order has been supplied and the one car that I referred to is here.

Q. They are all there? A. Yes, sir.

Q. What is the difference between that one and the remainder of those shipping orders that you hold in your hand?

A. On account of high water at the time the car was shipped from St. Louis the car was diverted from the Lemp Brewing Company at St. Louis to what is known as the Carondelet Station and then sent up to the main line of the Missouri Pacific.

Q. This Carondelet Station is right at St. Louis and within the city limits of St. Louis? A. Yes, sir.

Q. Now all of the other shipping orders are the shipping orders which were delivered to you as agent for the Missouri Pacific Railway Company at St. Louis with these various cars of beer? A. Yes, sir.

125 Q. Now I will ask you to look at the first of these shipping orders and then to look at those which follow and state

whether or not there is any difference between the first shipping order and the remainder, and if so what that difference consists of?

A. Yes sir, there is a difference; the first ticket calls for a car of beer, the same as the others do, with the exception that the balance carry notation "freight prepaid;" the first one does not.

Q. Now, what difference would there be with regard to collection or payment of freight charges on the first car tendered under a shipping ticket which carried no notation of the sort which you have mentioned and the remaining seventy-five cars which were offered for shipment under tickets bearing the notation "freight prepaid?"

A. In the first case the Missouri Pacific charges would be billed forward and collected, in the other cases the freight would be billed out prepaid and collected from the shipper.

Q. When would the billing showing that the freight was prepaid be made out?

A. On receipt of the shipping order of the car.

Q. So that as between the Missouri Pacific Railway Company and the consignee, or any subsequent carrier, the freight was understood as having been prepaid at the time you received those shipping orders? A. All except the first car.

Q. On all except the first car? A. Yes, sir.

Q. Was there any necessity, so far as the acceptance of these various cars of beer is concerned by the Missouri Pacific Railway Company for transportation, for the freight to have been prepaid on these cars?

A. No, sir.

Q. Would the Missouri Pacific Railway Company have accepted the seventy-five cars which were offered to it under shipping orders bearing notation "freight prepaid" just the same without that notation as they did with it? A. Yes, sir.

Q. You may explain to the jury the method of handling these shipments which were received under shipping orders bearing the notation "freight prepaid," and what was done as to the collection of the money for the payment of the freight charges on those cars after you received them for the Missouri Pacific?

A. On receipt of the shipping order bearing the notation "freight prepaid," the Lemp Brewing Company being on what is called our credit list, we immediately billed the cars out prepaid; after the cars had gone forward what is termed an expense bill was made for the purpose of collecting the money and icing from the W. J. Lemp Brewing Company, the shippers; this is after the car was forwarded and billed out, the shipping order being our authority to forward as prepaid.

Q. What was done with these expense bills after being made out in that way?

A. In the usual course reaching the cashier—had collection at certain stated periods—the bills were mailed to the W. J. Lemp Brewing Company, and they in turn remitted by mail for the payment of same.

Q. In what form were those remittances made?

[Q]. Made in the form of returning the expense bills rendered with a check.

Q. Through United States mail?

A. As a rule it comes United States mail; some cases possibly reached us by their messenger; they have a messenger service of their own.

127 Q. Were the expense bills covering these cars which we have just referred to mailed to the W. J. Lemp Brewing Company separately by themselves, or accompanied by other expense bills, bills with a general statement covering the business over a stated period?

A. They were mailed to the Lemp Brewing Company with all bills we might have against them at that time.

Q. Did the check which the W. J. Lemp Brewing Company sent to you, or the Missouri Pacific Railway Company through you, as you have stated, indicate in any way what particular expense bills they were meant for the payment of or were all covered by one general statement?

A. The checks generally were returned attached to the expense bills for all freight money that was due in accordance with the check; in other words they didn't make any special payment of any certain freight but mailed a check and attached to the expense bills they expected to cover.

Q. How often were these statements accompanied by the bills mailed to the Lemp Brewing Company, in other words, how often did you have settlements with them?

A. As a rule the practice was, and is yet, to mail the bills three times a week, and the Lemp Brewing Company didn't always pay three times a week, it pays when it suits their convenience; as a rule once a week, not less than that.

Q. Did I understand you to state a moment ago that the cars covered by these shipping orders and the expense bills you have mentioned moved out immediately when the billing was made out? A. Yes, sir.

Q. That was immediately upon presentation of these shipping orders and the cars to your company?

A. Yes, sir.

128 Q. You didn't wait to make any collection from the Lemp Brewing Company? A. No, sir.

Q. Do you know of any reason, so far as the Missouri Pacific Railway Company is concerned, or of any circumstance

or condition so far as that company was concerned, which made it necessary for the freight on these seventy-five cars which you have mentioned to be prepaid at St. Louis?

[Q]. There was no reason, unless desired by the shipper.

Q. So far as the railway company was concerned there was no reason? A. None whatever.

Q. Would the Missouri Pacific have received these shipments from the Lemp Brewing Company for transportation to the Baer Brothers Mercantile Company, as stated, on shipping orders which did not bear the endorsement "freight prepaid," in the same manner that the first shipment was taken?

A. Yes sir, they would have been accepted and forwarded.

Q. I will ask you, Mr. Adams, where you procured these shipping orders? A. Out of our station files.

Q. Those files are kept under your charge and control?

A. Yes, sir.

Q. You were the agent of the Missouri Pacific Railway Company at St. Louis, Missouri, during the entire period covered by these shipments? A. Yes, sir.

Q. And you have been so continuously ever since?

A. Yes, sir.

Q. And these are part of the records taken from the records of your office? A. Yes, sir.

Q. By whom were they made out?

129 A. By the W. J. Lemp Brewing Company.

Q. And they come to the Missouri Pacific with the shipments? A. Yes, sir.

Q. Did the Missouri Pacific Railway Company, at the time these shipments were received, receive any other paper or any other instructions of any kind whatsoever covering the transportation of these shipments except these shipping orders? A. Nothing else was received.

Q. I will ask you to explain, Mr. Adams, briefly these stamps which appear on the fact of some of these, I find Iron Mountain Railway switching to follow \$3., have those anything to do with the shipment or shipping instructions?

A. That is a local switching charge assessed by the St. Louis and Iron Mountain for delivery to the Missouri Pacific, the ticket following the car to us, that is, the shipping orders; that switching charge is absorbed out of the Missouri Pacific rate.

Q. Then neither of those stamp notations on there have anything to do with the handling of these shipments as between the Lemp Brewing Company and the Baer Brothers and the Missouri Pacific Railway Company? A. No, sir.

Defendant offers in evidence the seventy-six shipping orders, which, for convenience, have been bound together and marked

Defendant's Exhibit 1; which said Exhibit 1, and each and every of said expense bills comprising Exhibit 1, is in words and figures as follows, to-wit:

130

Deft's Ex 1.

Form 93 50M 6-1906

St. Louis, July 12 1902



Received, in Good Order, From

WM. J. LEMP BREWING CO.

By Missouri Pacific Railroad Co.

To be delivered to The Baer Bro. Mercantile Co.

At Leadville Colo.

Via D & R G.

Subject Rules of the Company's Bill of Lading.

1st Class	2d Class	3d Class	4th Class	5th Class	6th Class	SPECIAL
		P u e b l o H		50		

MARKS

ARTICLES

GROSS WEIGHT

ST. L. R. C. CO.

1337

100 Half Brls Beer
 40 Quarter Brls Beer
 2 Casks Btld Beer
 30 Casks Beer own size

18000

4000

500

7590

30090

Revised

I. M. Ry Switching
 to follow \$3 00

O. R.

S. L. AND CNT.

* * * * *

132 (The remainder of this Defendant's Exhibit 1 is omitted pursuant to the designation of plaintiff in error which appears at page 1 of this printed record, for the reason as there stated, that except as to date, weight and charges, the remaining forms in said exhibit are substantially identical with the second form in said Exhibit, the dates, weights and amount of charges being as set forth in the petition).

206 Q. You stated, Mr. Adams, that after the shipments were received, accompanied by these shipping orders, waybills were made out for these cars in your office?

A. Yes, sir.

Q. To what point were the waybills made out?

A. I stated there the waybills were made out in our office, one of them to which I referred was made out at Carondelet.

Q. Made there on account of high water?

A. Yes, sir. The bills for the other cars made at our office were made to Pueblo, Colorado.

Mr. Harrison: I think there is no reason to go into the facts which are admitted.

The Court: I understand that that has been admitted by the pleadings and counsel, that all these shipments, all but one, were from St. Louis to Pueblo.

Mr. Phillips: And from Pueblo to Leadville over the local waybill of the Denver & Rio Grande.

The Court: At the time the shipments were initiated it was understood their destination was Leadville; the carrier so understood it at the time.

Q. What became of those waybills?

A. The waybills, in the natural course of movement, would move either with the cars or, in some cases, mailed to the agent at Pueblo, Colorado; in such cases where mailed they were moved on what was termed card waybills from St. Louis to Pueblo.

Q. These original waybills then would not be in your office or under your control after the car had moved out?

A. No, sir.

Q. I will ask you, Mr. Adams, whether yourself, or any representative of the Missouri Pacific Railway Company under your direction, or employed in your office, ever received any protest from the Lemp Brewing Company with regard to freight rates on these cars which have been mentioned, the freight on which was prepaid by the W. J. Lemp Brewing Company of St. Louis?

207 A. At the time the shipments were offered on the shipping order there was no protest made.

Q. If any such protest was ever made please state when and how it was made?

A. The protest was made at the time of the payment of the bills.

Q. After the bills had been mailed to the Lemp Brewing Company? A. Yes, sir.

Q. In what manner was it made?

A. Well, the Lemp Brewing Company refusing to pay the bill without putting an endorsement on the expense bill "paid under protest."

Q. When did the expense bill with that endorsement on it reach you?

A. It reached us after the cars had been forwarded in remitting their check to cover payment of these cars.

Q. Do I understand you then to say that when the expense bill was mailed to the W. J. Lemp Brewing Company they would endorse "Paid under protest" on the face of it and then pin the check to that bill and send it in to you?

A. Yes sir, that is the method in which it was handled.

Q. So that you received that expense bill with that endorsement on it at the same time you received the check to cover it and other bills? A. Yes, sir.

Q. Was that statement correct, that the Lemp Brewing Company put that endorsement on there?

A. That is my recollection of it, sir.

Q. And this wasn't done until some time after the shipments in question had been received from the W. J. Lemp Brewing Company under these tickets, which have already been introduced in evidence, with instructions to bill prepaid?

A. That is correct sir.

208 Q. Have you examined the books of your office for the purpose of ascertaining how long after the shipments were tendered to your company by the W. J. Lemp Brewing Company on these tickets which bore simply the notation "freight prepaid" and no reference to any protest whatever, the checks were received at your office accompanied by the expense bills bearing the notation "Paid under protest," placed thereon by the W. J. Lemp Brewing Company?

A. Yes sir, I had the records examined and in every case we found it was some time after the car had gone forward in accordance with the shipping order.

Q. Have you any memorandum with you which you made from which you can state the various periods of time after shipment was tendered under these shipping orders, and after the car had moved out, that this protest was sent in?

A. Yes sir, I have.

Q. Will you please look at that memorandum and just state for the information of the jury what some of the periods of time were?

The Court: What is the object of that, what difference does it make whether it was a long time or short time?

Mr. Phillips: I don't know that it makes any difference.

The Court: Well, you are simply taking up the time of the court; he can state approximately without reading a long list of figures.

Q. State, in a general way, what was about the length of time?

A. According to the statement I should judge the average was about six days.

Q. What would be the maximum?

A. I imagine fourteen days.

Q. Run from about a week to about two weeks after the shipment was received? A. Yes, sir.

Cross Examination

By Mr. Harrison:

Q. I understood you to say that all shipments were in fact prepaid under protest, and that the Lemp Brewing Company refused to pay except by protest?

The Court: Didn't he state the facts? Isn't it apparent that that is a conclusion, if he stated all the facts in connection with the shipments and the payment of the freight by Lemp?

Mr. Harrison: I just want it distinctly understood that the payments were made under protest notwithstanding they were not paid at the time.

Q. I understand you to say that the check with the expense bill was received through the mail with this endorsement written on it by the Lemp Brewing Company, was that communication by mail received by you first and opened by you or did it go through the hands of some other clerk?

A. In the ordinary course of business, the volume being quite large, the envelope would be opened by one of my clerks and in turn turned over to the cashier.

Q. Could you identify the handwriting on those shipping receipts or expense bills?

A. I cannot say that I can, sir, but I will try it.

Q. I show you a receipt dated July 28th, or expense bill, which has endorsed on it "paid by W. J. Lemp & Co. on basis of \$1.05 under protest?"

A. I can't say whose handwriting that is, sir; not in the handwriting of my clerk; I believe it is that of the party that sent the money.

Q. Isn't it a fact that these expense bills with a check were presented to the Missouri Pacific agent by a messenger?

A. As I stated in my examination it was done both ways, by messenger and by mail.

Q. It wasn't invariably by mail? A. No, sir.

Q. And as a rule you didn't receive the mail and open it?

A. I didn't personally.

210 Q. So that you don't know, of your own personal knowledge, who made the endorsement of protest on these expense bills?

A. The money was receipted for by my cashier and I know the notation is not in his handwriting.

Q. But you don't know in whose handwriting it is?

A. I can't say.

Q. You can't state of your own knowledge that the Lemp Brewing Company wrote the endorsements on the expense bills "paid under protest?"

A. Except that my instructions were to the cashier not to make it but to accept it when made by the Lemp Brewing Company.

Q. But I understood you to say that the Lemp Brewing Company refused to make the shipment unless it was paid under protest?

A. No sir, I stated that the cars and the shipments were handled on the shippers order; that order bore no notation as to protest.

Q. You did know, however, that the Lemp Brewing Company protested against this rate on each and every shipment?

A. After the bill was presented they did.

Re-direct Examination

By Mr. Phillips:

Q. Mr. Adams why were these shipments waybilled, as you have stated, to Pueblo when the fact is shown on the shipping orders that they were intended for ultimate delivery to the Baer Brothers Mercantile Company at Leadville?

A. The shipments were billed to Pueblo for the reason that we had no through rate or billing arrangements on these shipments; they were billed to Pueblo at the Missouri Pacific local rate.

Re-cross Examination

By Mr. Harrison:

Q. That was simply a matter between the two carriers, the shipper had nothing to do with your billing arrangements?

A. In accordance with the tariffs we had our rate on this beer was only published to Pueblo.

Q. Yes, but you received the entire rate from St. Louis
211 to Leadville, that was the shipping order, and that was the way the expense bill read; now your billing arrangement was simply a matter between your road and the Denver & Rio Grande, was it not?

A. As to that we have shipments delivered to us for various destinations.

Q. I am speaking of this particular shipment?

A. This particular shipment we hadn't any through rate and we applied, in the collection of money, our rate to Pueblo and the local rate to Leadville.

Q. If you had had a through rate would you not have used the same billing arrangement that you did use for the purpose of settlement between the Missouri Pacific and the Denver & Rio Grande?

A. As to that it is a matter of tariff regulations, and our arrangements where we have through rates published with other lines we very often have through billing arrangements.

Q. You have through billing arrangements when you collect at the time of delivery?

A. Yes sir, very often do on a through tariff.

Q. But where the freight is prepaid on any circumstances isn't it usual for the carriers between themselves to give their local waybills from the point of origin to the end of their line?

A. Not in all cases; the most is to the contrary.

Q. You did in this case? A. Yes in this case.

Q. And the shipper has nothing to do with that waybill whatever; he doesn't see it; it is no part of his contract; not given under his instructions at all?

A. The waybill is certainly not given under his instructions.

H. H. Coombs, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. Please state your name, age, residence and occupation?
212

A. H. H. Coombs; Pueblo; 50; local freight and ticket agent of the Missouri Pacific Railway.

Q. Mr. Coombs, you have heard the statement in regard to what this is, that it is about the seventy-six shipments of beer?

A. Yes, sir.

Q. Did the office of which you now have charge, local freight agent of the Missouri Pacific Railway Company at

Pueblo, have anything to do with the handling of those seventy-six carloads of beer?

A. Yes sir, we handled those shipments through Pueblo for delivery to the Rio Grande.

Q. You heard Mr. Adams' statement, did you, that the waybills on which these cars moved would come into the hands of the Agent at Pueblo? A. Yes, sir.

Q. I will ask you if it is a fact that these waybills did come into your hands? A. Yes sir, they did.

Q. You may state what these papers are?

A. These are the original seventy-six waybills cut from our permanent station files.

Q. What is this package of papers?

A. This represents copies of the seventy-six bills which I had made in my office. Have examined them and know that they are copies of the original.

Q. These copies were made under your personal direction, and have been checked and you know that they are exact copies of the originals? A. Yes sir, they are exact copies.

Defendant offers in evidence copies of the original waybills over the Missouri Pacific Railway Company's line from St. Louis to Pueblo, and ask that they be consolidated and marked Defendant's Exhibit 2.

Plaintiff, by its counsel, objects to the introduction of
213 Defendant's Exhibit 2 for the reason that it is incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court the plaintiff, by its counsel, then and there duly excepted.

Said Defendant's Exhibit 2, being the copies of the seventy-six waybills, and each of said waybills, being in words and figures as follows, to-wit:

* * * * *

Form 1874

This Form to be Used for Billing ORDINARY Freight ONLY.
See Classification in Book of Instructions Governing the Handling of Rail and Greed Ball Freight.

THE MISSOURI PACIFIC RAILWAY COMPANY.

2-1908 500M-C

2-1908 500M-C

80
-11
11
10
-11
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From St Louis to Pueblo Colo Date 7/28 1902

Route	Via Junction K C S W J		Via Junction C S W J		Via Junction C S W J	
	With	Without	With	Without	With	Without
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2	1	1	1	1	1	1
3	1	1	1	1	1	1
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COPY

Weigh this Car at Marked Cap'y of Car.....Lbs.
 Stop this Car at For

*When a Through Rate is used, and Shipment is to be Re-Way-Billed en route, the Sub-Division must be shown in the Rate Column in Road Order. Noting Opposite each Proportion the Initial of the Road to which it Accrues.

SHIPPER.	Connecting Line Reference, Original Car and Way-Bill Number and Point of Shipment.	Marks, Consignee and Destination.	Articles and Classifications Combinations. (O. R., C. R., Rel., GdL, Etc.)	Weight	*Rate and Authority	Freight, Advances,	Line Prepaid.	Total or Prepaid Collect, Beyond
W J Lemp B Co	The Baer Bros Mer Co Leadville Colo	2500 125 hlf Bbls Beer	K					
F 99	Via D & R G 15	Qts ✓ Cks Bot ✓ C-cks Beer	O R S L & C	31545	50	15775	Paid 15775	17349
								The Mo Pac Ry Co Rec'd July 30 1902 H C Post Agr Pueblo Colo

Agents at Junction Stations Receiving this Way-Bill must Stamp in the Spaces Below, in Consequence of Order, the Names of the Agents at Destination to whom the Goods will be Forwarded, and the Date when the Goods are Received.

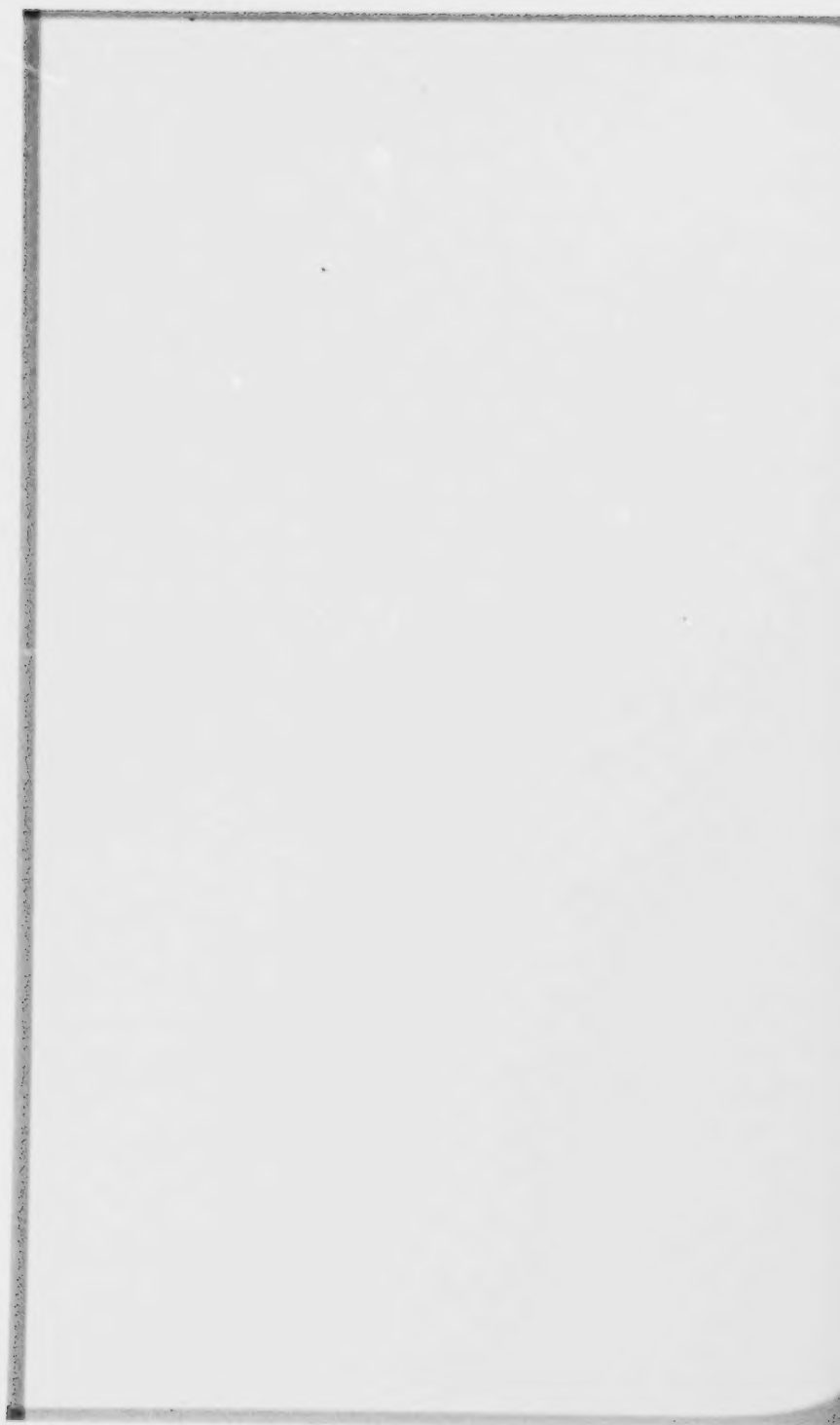
WESTERN UNION TELEGRAPH CO.	NEW YORK	DATE
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ING ASSOCIATION.

**SUBSCRIBERS WANTED TO SEND IN Stamp of Junction For-
junction For-
winding Agent, winding Agent,**

**This Stamp must be used only
on billing for business Covered by
SPECIAL AGREEMENT. 30**

Train	Date	Cond'r	Weight of Car and Contents.	Tons Gross	Above for use only in enabling Conductor to estimate his trainload.
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15	1904				
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100	1904				



216 (The remainder of this Defendant's Exhibit 2 is omitted pursuant to the designation of plaintiff in error which appears at page 1 of this printed record, for the reason as there stated, that except as to date, weight and charges, the remaining forms in said exhibit are substantially identical with the second form in said Exhibit, the dates, weights and amount of charges being as set forth in the petition).

290 Q. Now, Mr. Coombs, after cars containing these various shipments were received at Pueblo on these waybills what became of the cars in the ordinary course of business?

A. Upon receipt of the shipments the waybills were taken into our account at Pueblo and transfer or expense bills made for the Denver & Rio Grande giving the name of the consignee, full billing reference, destination, weight, and whether prepaid or charges advanced, I believe there is advanced charges in only one case, the amount due the Denver & Rio Grande to carry the shipments from Pueblo to Leadville; after that the cars were ordered switched to the Denver & Rio Grande connection.

Q. What became of this expense bill covering the car?

A. It was made in duplicate, sent to the office of the local agent in Pueblo of the Denver & Rio Grande, receipted for and one copy retained by him and the other retained by us, filed in our office as a part of the station records.

Q. When were the settlements between your office and the office of the local agent of the Denver & Rio Grande Railroad Company in regard to freight on these cars made, and how?

A. Charges on these particular cars would go in with the daily interchange of business of one line to the other, and daily settlements were made; simply treated as any other concern or private individual would be treated, the daily settlement being made between the two offices of the local agents.

Q. Was there any difference in the form of the expense bill which your office made out and passed to the Denver & Rio Grande Railroad Company's local agent at Pueblo at the time the car was switched over to the Denver & Rio Grande from the sort of an expense bill that would have been
291 presented to any person receiving freight at Pueblo who was on the credit list of your station?

A. We use the same form of expense bill as we use for firms in the city.

Cross Examination

By Mr. Harrison:

Q. Mr. Coombs, this expense bill that you speak of was a private settlement between the Missouri Pacific and the Den-

ver & Rio Grande, was it not, of the charges for the transportation of these goods from St. Louis to Leadville?

A. Yes sir, it became a part of our daily settlement of business between the two lines.

O. O. Stanchfield, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. You may state your name, age, residence, and occupation?

A. O. O. Stanchfield; 42; local freight agent of the Denver & Rio Grande Railroad Company at Pueblo, Colorado.

Q. You have heard the statement which has been made to the other witnesses in regard to this case? A. I have.

Q. I will ask you if you were the agent of the Denver & Rio Grande Railroad Company at Pueblo, as you have stated, during all the period of time covered by the seventy-six shipments? If during a part of that time you held any other official connection, or otherwise, with said company state what it was?

A. From the beginning of the shipments in 1902 up to March 1904 I was chief clerk, becoming agent in March 1904 and continuously since that time.

Q. As chief clerk did you have general supervision, under the then agent, of the business of the local freight office of the Denver & Rio Grande at Pueblo?

A. Practically the same general supervision as I have at the present time.

Q. I will ask you, Mr. Stanchfield, if the local freight office of the Denver & Rio Grande Railroad Company had
292 anything to do with these shipments?

A. They did receive the shipments.

Q. How did they receive them?

A. The Missouri Pacific Railroad delivered on a connecting line track, the same as any other shipper from Pueblo.

Q. Were the cars when so delivered accompanied by any papers or instructions?

A. They were accompanied or preceded by billing instructions or transfer sheets from the delivering line.

Q. I will show you, Mr. Stanchfield, a package of seventy-six papers, and ask you to state what they are?

A. They are expense bills given by the Missouri Pacific authorizing the forwarding of the several cars of beer enumerated to Leadville.

Q. Are those the original shipping instructions which were received by the local office of the Denver & Rio Grande Rail-

road Company at Pueblo covering the handling of these cars of beer which have been mentioned here?

A. Those are the original transfer sheets taken from the records of the Denver & Rio Grande station at Pueblo.

Q. Which are in your charge as agent?

A. They are in my charge as agent.

Q. What information is contained on those orders?

A. The information given is the car number, the contents and destination, the consignees, and the amount we shall pay to the Missouri Pacific or the amount they shall pay to us in regular settlement.

Q. What relation, if any, does an order of the kind that those are bear to the shipping order given to your office by any person desiring to ship carload freight from Pueblo?

A. It has the same information required or given by any other shipper, with the exception that it is a different form.

Q. That is to say, this is a form printed by the Missouri Pacific Railway Company and the form presented by a
293 local shipper would be the Denver & Rio Grande bill of lading or a bill of lading furnished by the shipper.

Q. But the information is exactly the same in both cases?

A. Yes sir, exactly the same.

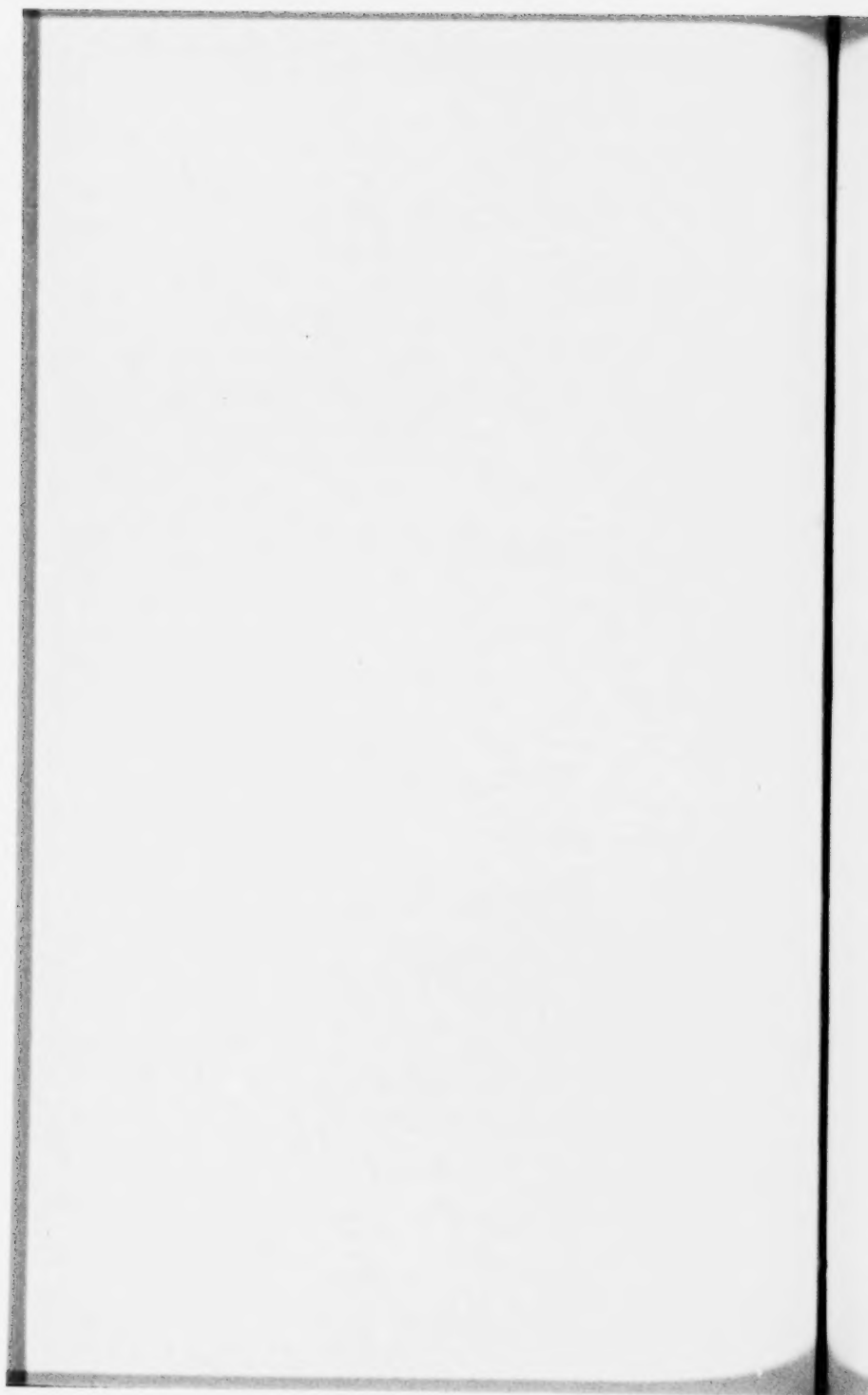
Defendant offers in evidence the expense bills transferring these cars in question to the Denver & Rio Grande Railroad Company with the shipping instructions, and asks that they be consolidated and marked as Defendant's Exhibit 3.

Plaintiff objects to the introduction of Defendant's Exhibit 3 as incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court the plaintiff, by its counsel, then and there excepted.

Said Defendant's Exhibit 3, being the seventy-six expense bills, and each thereof, is in the words and figures as follows, to-wit:



294

Deft's Ex. 3

Form 1149.—Rev.

Ex. Bill No. 1033

Claims for over-charge, Loss or Damage must INVARIABLY be accompanied by ORIGINAL BILLS OF LADING AND EXPENSE BILLS.

Pueblo Station, ——— Division, 7/14 1902.
M The Baer Bros. Mer. Co.

Attach to them bill against Company, giving particulars.

Leadville, Colo.

D. & R. G. Ry TO THE MISSOURI PACIFIC RAILWAY CO., Dr.

E. B. No.		For Transportation and charges on	Weight	Rate	Freight Charges	Advance Charges
Where from	S Louis	100/2 Brls Beer				
Consignor	W I L.	40/4 " "			2114	
Way-bill No	D 243	2 csk Bot				
Car No.	1337	30 " Beer own size				
Car Initial	R C C Co	300/90		50	150/45	
Date of W. B. transferred from car	7/12					

Received Payment

150/45

———Agent.

Cartage
Total Charges

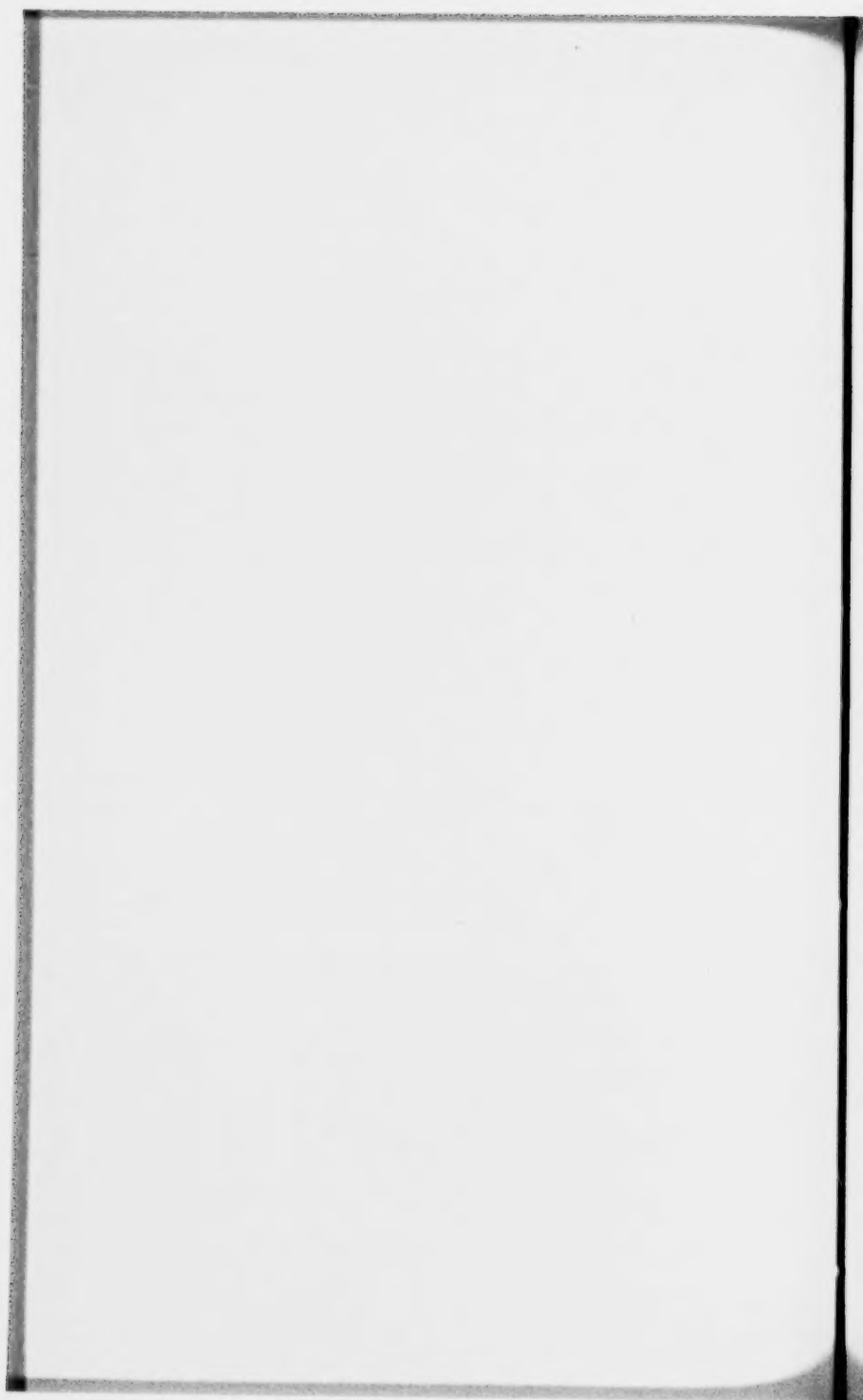
Charges payable on delivery. Goods to be removed within twenty-four hours after arrival.

NOTE—Matter in black face is in lead pencil in original copy.

WESTERN RAILWAY WEIGH-
ING ASSOCIATION.

SHIPPERS WEIGHT TO BE USED IN
BILLING THIS CAR.

This Stamp must be used ONLY
ON billing for business Covered by
SPECIAL AGREEMENT.



295

Form 1149.—Rev.

Ex. Bill No. **2390**

Claims for overcharge, Loss or Damage must INVARIABLY be accompanied by ORIGINAL BILLS OF LADING AND EXPENSE BILLS.

Pueblo Station, _____ Division, **7, 30 1902**
M The Baer Bros. Mer. Co.

Attach to them bill against Company giving particulars.

D. & R G

TO THE MISSOURI PACIFIC RAILWAY CO., Dr.
Leadville, Colo.

E. B. No.		For Transportation and charges on	Weight	Rate	Freight Charges	Advance Charges
Where from	St Louis	125 Hf Brls Beer				
Consignor	W.J.L.B.Co	40 Or " "				
Way-bill No	D 574	5 casks " "				
Way-bill No	D 274	5 casks " Bttl				
Car No.	1325	15 " "				
Car Initial	St L & Ri		31 545	50	Paid	
Date of W. B. Transferred from Car	7/28					

Received Payment

4659

_____ Agent.

Cartage

Total Charges

Paid	

Charges payable on delivery. Goods to be removed within twenty-four hours after arrival.

NOTE—Matter in black face is in lead pencil in original copy.

WESTERN RAILWAY WEIGH-
ING ASSOCIATION.

SHIPPERS WEIGHT TO BE USED IN
BILLING THIS CAR.

This Stamp must be used ONLY
ON billing for business Covered by
SPECIAL AGREEMENT.



* * * * *

296 (The remainder of this Defendant's Exhibit 3 is omitted pursuant to the designation of plaintiff in error which appears at page 1 of this printed record, for the reason as there stated, that except as to date, weight and charges, the remaining forms in said exhibit are substantially identical with the second form in said Exhibit, the dates, weights and amount of charges being as set forth in the petition).

370 Endorsed: No. 5180. United States Circuit Court, District of Colorado. Baer Brothers Mercantile Company vs. Denver & Rio Grande Railroad Company. Defendant's Bill of Exceptions. Vol. I. Filed Dec. 29, 1908, Charles W. Bishop, Clerk.

371 Q. Mr. Stanchfield, I will ask you to state what was done with regard to these cars, so far as the Denver & Rio Grande Railroad Company was concerned, after the Denver & Rio Grande Railroad Company took possession of the cars under those forwarding orders?

A. The cars, under the instructions furnished by the shipper, were placed in trains for forwarding, the billing being made to carry the car to Leadville at Pueblo station, and the information on the waybill is a copy of the instructions given on the transfer sheet from the Missouri Pacific.

Q. I will show you a package of papers and ask you to state whether or not those are the original waybills on which these shipments moved?

A. Those are the original waybills on which these shipments moved; I have checked them and therefore know such to be the case.

Q. I will show you another package of papers and ask you to state what they are?

A. These are copies of the original waybills, which I have checked previous to this and know they are exact copies of the originals.

Defendant offers in evidence copies of the original waybills on which these shipments moved from Pueblo to Leadville, and asks that they be consolidated and marked as Defendant's Exhibit 4.

Plaintiff objects to the introduction of Defendant's Exhibit 4 as being incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court the plaintiff, by its counsel, then and there duly excepted.

Said Defendant's Exhibit 4, being the copies of the seventy-six waybills, and each thereof, is in words and figures as follows, to-wit:

* * * * *

THE DENVER AND RIO GRANDE RAILROAD CO.
 Local Way-Bill,
 From Pueblo Colo to Leadville Colo Date July 14 1902

Train Tonnage
 Weight of Car and Load
 35 Tons

Via Junction		Via Junction		Via Junction	
With	Ry	With	Ry	With	Ry
.....

Agent at Destination
 will Stamp Herein
 the Date Received

Gross, Tare or Net Weight of Car
 Load Freight to be Entered in this
 Space, where the Car is weighed.

Way-Bill No. 2184

Car Int. R C Car No. 1337

Transferred into

Weigh this Car at.....Marked Capacity of Car.....lbs.

Stop this Car at.....For.....

Int.....No.....At.....

Int.....No.....At.....

C O P Y



D. & R. G. R. R. CO. VS. BAER BROS.

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Consignor	Consignee and Destination	No. of Pags.	Description of Articles	Separate Weight	Weight	Rate	Freight	Advances	Prepaid	To Collect	Prepaid Beyond
M P	The Baer Bro Mer Co										
1033 7/14	976	100	Hf Brl Beer				C O P Y				
St Louis		40	Qr ✓ ✓								
		2	Csk Bot ✓		30090	.40	180.54				
D 243		30	✓ ✓ ✓ Own Size			.45	135.41	150.45			
										890.49	
										285.86	



Form 3601-3-07-75M.

Local Way-Bill.

THE DENVER AND RIO GRANDE RAILROAD CO.

From Pueblo Colo to Leadville Colo Date July 31 1902

Train Tonnage
Weight of Car and Load
30 Tons

Via Junction		Via Junction		Via Junction	
With	Ry.	With	Ry.	With	Ry.

Agent at Destination Will
Stamp Herein the Date
Received.

Gross Tare and Net Weight of Car
Load Freight to be Entered in this
Space, when the car is weighed.

WAY-BILL No. 4659
CAR WT. S L R C CAR No. 1325

Weight this Car at _____ Lbs.
Stop this Car at _____ For _____

COPY

TRANSFERRED INTO

Int. No. _____ M.
Int. No. _____ M.

D. & R. G. R. R. CO. VS. BAER BROS.

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Consignor	Consignee and Destination	No. of Pages	Description of Articles	Separate Weight	Weight	Rate	Freight	Advances	Prepaid	To Collect	Prepaid Beyond
M P	Bro The Baer Mer Co ^										
2890											
St Louis.	33	125	Hf Brl Beer								
		40	Qr ✓ ✓								
D 574 7/30		5	Csk Btl ✓								
		15	✓ ✓ ✓		31545	63	185 27	Pd		185 27	
						45	141 95			141 95	



374 (The remainder of this Defendant's Exhibit 4 is omitted pursuant to the designation of plaintiff in error which appears at page 1 of this printed record, for the reason as there stated, that except as to date, weight and charges, the remaining forms in said exhibit are substantially identical with the second form in said Exhibit, the dates, weights and amount of charges being as set forth in the petition).

452

Cross-Examination

By Mr. Harrison:

Q. Mr. Stanchfield, what is the difference between the transfer sheet made out by the Missouri Pacific Railway Company that was delivered to the Denver & Rio Grande Railroad Company and those expense bills that you referred to?

A. It is the same document; we call them sometimes expense bills and sometimes transfer sheets; all one and the same document.

Q. Is it the same as these waybills that have been introduced in evidence here from the Missouri Pacific?

A. No, sir.

Q. I am asking you what is the difference between these expense bills and that waybill that the Missouri Pacific delivered to the Denver & Rio Grande at Pueblo?

A. Why, the expense bill delivered to us is our instructions, or the Denver & Rio Grande's instructions, for forwarding over their rails.

Q. Who give the Denver & Rio Grande those instructions?

A. On those shipments the Missouri Pacific.

Q. You stated that you made the shipment under instructions from the shipper, you never received any instructions from the shipper? A. No instructions from the shipper.

Q. You made the shipment solely on these transfer sheets from the Missouri Pacific, that was your authority for making the shipments? A. Yes sir, that was our authority.

S. M. Brown, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. State your name, age, place of residence and occupation?

453 A. S. M. Brown; Leadville; 65; general agent of the Denver & Rio Grande.

Q. Were you general agent of the Denver & Rio Grande Railroad at Leadville during the period of time between July, 1902, and March or April, 1907? A. Yes, sir.

Q. During that time did you have general charge or control or direction of the freight business of the Denver & Rio Grande Railroad Company at that point? A. Yes, sir.

Q. Are you acquainted with the Baer Brothers Mercantile Company, the petitioner in this case? A. Yes, sir.

Q. And with its president, Mr. Adolph Baer who testified here yesterday? A. Yes, sir.

Q. Mr. Baer, this case involves freight rates on seventy-six carload shipments of beer from the W. J. Lemp Brewing Company in St. Louis to the Baer Brothers Mercantile Company at Leadville; the complaint states that the first shipment left St. Louis on or about the 12th day of July, 1902, and the shipping order and Missouri Pacific waybill now in evidence say that St. L. R. C. Co. car 1337, containing 30090 pounds of beer was shipped on that date, July 12, 1902, by the William J. Lemp Brewing Company to the Baer Brothers Mercantile Company at Leadville; I will ask you if you had anything to do with the handling of that car of beer after its arrival at Leadville?

A. It was handled at the station in the usual manner.

Q. And you were the agent in charge of that station?

A. Yes, sir.

Q. Can you state, Mr. Brown, from your own knowledge, or from the records of the Leadville station, on what day
454 that car, which left St. Louis on July 12, 1902, and which is the first shipment mentioned in the petition in this case, arrived at Leadville?

A. I have a memorandum taken from the records that I can read from.

Q. I will ask you whether or not those station records were kept under your charge and direction? A. Yes, sir.

Q. And they are the official records of the Leadville station of the Denver & Rio Grande Railroad? A. Yes, sir.

Q. And you have made that memorandum from a personal inspection of the records? A. Yes, sir.

Q. And you know that that memorandum shows the facts as shown by the records? A. Yes, sir.

Q. I will now ask you to refer to your memorandum and state what date that car arrived at Leadville?

A. Car 1337 was received at Leadville July 15, 1902.

Q. I will now ask you on what date that car left Leadville?

A. Left Leadville on July 18, 1902.

Q. Do you know of your own knowledge, or do the records of Leadville station kept under your charge and direction, as you have stated, show whether or not that car was loaded or empty when it left Leadville on July 18, 1902?

A. Loaded with empty beer kegs.

Q. Who loaded the empty beer kegs into the car, do you know? A. The Baer Brothers Mercantile Company.

Q. Now I will ask you, Mr. Brown, to state whether you know, of your own personal knowledge or from an examination which you may have made of the records of 455 Leadville station, who paid the freight on that car St. L. R. C. 1337 into Leadville?

A. Baer Brothers Mercantile Company.

Q. When did the Baer Brothers Mercantile Company pay the freight on that car?

A. The freight was paid on July 18, 1902.

Q. That was the same day that car left Leadville loaded with empty beer kegs? A. Yes, sir.

Q. I will ask you, Mr. Brown, whether or not during the time covered by the shipments involved in this suit, to-wit, from July, 1902, to March or April, 1907, the Baer Brothers Mercantile Company was on what is commonly referred to as the credit list of the Leadville station?

A. They were, yes sir.

Q. Was there any necessity for the Baer Brothers Mercantile Company to pay to the Denver & Rio Grande Railroad Company freight on shipments consigned to it before the Denver & Rio Grande would deliver the freight to the Baer Brothers Mercantile Company, or allow the Baer Brothers Mercantile Company to take possession of the freight?

A. They, being on the credit list, could take the freight and wait until the bill was presented for payment.

Q. I will ask you, Mr. Brown, whether as a matter of fact that course was pursued in the case of this particular car St. L. R. C. 1337, when it arrived at Leadville on July 15, 1902, as you have stated? A. Yes, sir.

Q. Then the beer in that car was actually delivered to the Baer Brothers Mercantile Company directly on arrival, was it?

A. Yes, sir.

Q. And no demand was made upon the Baer Brothers 456 Mercantile Company for the payment of the freight on a car before the freight was delivered? A. No, sir.

Q. As a matter of fact the Baer Brothers Mercantile Company had unloaded the beer out of that car, and re-loaded the car with empty beer kegs, before they paid the freight on the car? A. Paid on the same day.

Q. The car went out loaded with empty kegs on the same day that the bill was paid? A. Yes, sir.

Q. I will ask you, Mr. Brown, whether you know what the local rate on beer per hundred pounds, carload lots, was be-

tween Pueblo and Leadville during the period covered by the shipments involved in this suit?

A. Forty-five cents per hundred pounds.

Q. Had it been the same for some time prior to July 12, 1902? A. Yes, sir.

Q. Do you know, of your own knowledge, that that rate was known to the Baer Brothers Mercantile Company, and to Mr. Adolph Baer, its president, and had been known to him and said company personally for some time prior to July 12, 1902? A. Yes, sir.

Q. Did the Baer Brothers Mercantile Company make any objection to the payment of the freight bill on this shipment when the bill was presented?

A. I had a conversation with Mr. Baer on two or three occasions when he objected, all of which was subsequent, as I remember, to the meeting of the Interstate Commerce Commission at Leadville in which he objected to the payment of forty-five cents per hundred as being too high a rate.

457 Q. What I am referring to particularly, Mr. Brown, is when this particular bill on this particular car, St. L. R. C. 1337, was presented to Baer Brothers Mercantile Company for payment, what happened?

A. I don't remember presenting that myself, and don't remember his protesting against payment of the freight charges on that particular car to me.

Q. At all events you know that that car left Leadville on July 18, loaded with empty kegs, and that the freight bill was paid that same day? A. Yes, sir.

Q. I will ask you whether you, or the Denver & Rio Grande Railroad Company at Leadville, ever made any threats to the Baer Brothers Mercantile Company, or to any of its officers, with regard to any action which would be taken against that company if it refused to pay the freight on these bills, or whether there were any threats made to take that company off the credit list if they didn't pay this bill? A. No, sir.

Plaintiff objects to the question as immaterial, and asks that the answer be stricken.

Objection sustained; answer stricken.

To which ruling of the Court, the defendant, by its Counsel, then and there duly excepted.

Cross Examination

By Mr. Harrison:

Q. Mr. Brown, you remember you testified before the Commission, did you not? A. No, sir.

Q. You didn't? A. No, sir.

Q. You state that you don't recollect that a memorandum was made upon the expense bill "paid under protest" and signed by you? A. I don't remember that.

458 Q. What would have been the result if the Baer Brothers Mercantile Company had refused to pay the rate?

Defendant objects to the question as immaterial.

Objection sustained.

W. W. Lampton, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. State your name, age, place of residence, and occupation?

A. W. W. Lampton; Denver; 42; assistant general freight agent of the Denver & Rio Grande.

Q. Are you acquainted with the Baer Brothers Mercantile Company, the petitioner in this case, and with Mr. Adolph Baer, its president? A. Yes, sir.

Q. How long have you been acquainted with the company and Mr. Baer? A. About fifteen years.

Q. That is, fifteen years with Mr. Baer?

A. Yes, sir. I believe that the company hadn't existed that long.

Q. Do you know where Mr. Baer resides at the present time? A. Salt Lake City.

Q. How long has he made his residence there, to your knowledge? A. I should say three or four years.

Q. Do you know where the principal place of business of the Baer Brothers Mercantile Company is at the present time?

A. Salt Lake.

Q. Now, Mr. Lampton, I will ask you to state, if you can, explain briefly, clearly and generally, so the jury will
459 understand it, the difference between classification rates, or classified rates, and a commodity rate?

A. Well, in this country we have what is known as a western classification which governs the movement of all freight unless specifically taken out of the classification and a special rate made upon a certain commodity; beer, under this classification, takes what is known as fifth class rate; in this case it was taken out of the fifth class and a special commodity rate published.

Q. But if there were not a commodity rate on beer, beer would fall within what is known as the fifth class?

A. Yes, sir.

Q. Now how long has there been in existence a commodity rate, so-called, on beer between Pueblo and Leadville?

A. Since the early part of May, 1898.

Q. And has that rate been the same during all of that time since about May, 1898? A. Yes, sir.

Q. That is, it is the same as the rate which is complained of having been in effect during the time these shipments involved in this case moved, forty-five cents per hundred on beer in carloads? A. Yes, sir.

Q. Prior to 1898 beer was fifth class, was it, and the same rate that applied on all commodities known as fifth class applied on beer between those points? A. Yes, sir.

Q. I will ask you whether or not the fifth class rate which was in effect at that time was higher or lower than the commodity rate?

A. The fifth class rate at that time was sixty cents per hundred.

Q. And the commodity rate of forty-five cents per hundred was put in on beer?

A. Yes, sir.

Q. Now when was the Denver & Rio Grande Railroad built into Leadville?

A. In the summer of 1880, I think.

Q. Do you know what the rate per hundred pounds between Pueblo and Leadville was on fifth class commodities, including beer, at the time the road was built in there?

Plaintiff objects to the question as incompetent, irrelevant and immaterial; has nothing to do with the issues in this case.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. Do you know whether the fifth class rates at the time the road was opened into Leadville, and for some time subsequent thereto, were higher or lower than the fifth class rate which was in effect at the time this commodity rate was put in on beer?

Plaintiff objects to the question as incompetent, irrelevant and immaterial; has nothing to do with the issues in this case.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. I will ask you, Mr. Lampton, whether or not during the period of time between the opening of the line of road of

the Denver & Rio Grande Railroad Company between Pueblo and Leadville and the time when this commodity rate was put in on beer at 1898, as you have already testified, there had been a general and continuous reduction in rates on fifth class commodities, including beer?

461 Plaintiff objects to the question as incompetent, irrelevant and immaterial; has nothing to do with the issues in this case.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. I will ask you, Mr. Lampton, what is the principal character of business done to and from Leadville, the freight business?

Plaintiff objects to the question as incompetent, irrelevant and immaterial.

Objection overruled.

To which ruling of the Court the plaintiff, by its counsel, then and there duly excepted.

A. Practically all business out of Leadville consists of ore and bullion. The biggest part of the business into Leadville is ore, coal, coke, lime rock; general merchandise, of course.

Q. What are the commodities which you have mentioned, coal, lime rock, ore, shipped into Leadville for?

A. Ore, lime rock, coke, used in smelting; of course the coal is used in the smelters as well as for local consumption and in the mines.

Q. About what proportion of the business in and out of Leadville is made up of this coal, lime rock, ore and bullion business?

A. 85 or 90 per cent; I don't know exactly the figures; shouldn't think the general merchandise business would amount to over ten per cent of the business into Leadville, if that.

Q. How do the freight rates on coal, lime rock, ore and bullion in and out of Leadville compare with rates on the same commodities in other places?

Plaintiff objects to the question as immaterial.

462 Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. Do you know whether or not there has been either an increase or decrease in the amount of business done in and out of Leadville within the past two or three years?

Plaintiff objects to the question as incompetent, irrelevant and immaterial; now dealing with a particular period of time and with the reasonableness of the rates on shipments of beer.

Objection overruled.

To which ruling of the Court the plaintiff, by its counsel, then and there duly excepted.

A. I should say since the fall of 1907 there has been a decrease in the business into and out of Leadville; up to that time the business for a year or two had been on the increase.

Q. Can you state about what that decrease was?

A. I can speak so far as the Denver & Rio Grande road was concerned, probably about one-sixth.

Plaintiff objects to the question as immaterial, and asks that the answer be stricken.

Objection sustained, answer stricken.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. I will ask you, Mr. Lampton, if you know what the retail price of beer is in Denver? A. Yes, sir.

Q. Do you know what the retail price of beer is in Leadville? A. Yes, sir.

Q. Is there any difference? A. No, just the same.

Cross Examination

By Mr. Harrison:

463 Q. Mr. Lampton, is it not a fact that the Denver & Rio Grande Railroad Company has filed with the Interstate Commerce Commission its local rate from Pueblo to Leadville on beer? A. Yes, sir.

Q. When did it do that?

A. Why, my recollection is it was either in the spring of 1907 or the fall of 1907, I am not certain which; it was after the Commission had requested that all local rates be filed with it.

Q. Have you got that request of the Commission?

A. It was printed, one of their printed, what they call administrative orders.

Q. It was an order, was it not?

A. No sir, it wasn't an order, I use the word that they used, a request.

Q. Was it not a notification to you, and to other roads, that while you applied a local rate to a through transportation that the Interstate Commerce Act, as amended in 1906, required that you should file your tariffs?

A. No sir, that isn't the language of the Commission at all.

Q. Have you that request with you?

A. No sir, I haven't it with me; I can get it.

Clyde Murdock, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. State your name, age, place of residence, occupation?

A. Clyde Murdock; Denver, Colorado; 29; clerk in the offices of the general agent of the Southern Pacific, Denver.

Q. I will ask you, Mr. Murdock, to state whether or not you are familiar, or required to be familiar, as a part of your duties, with the various rates in effect on the line of the Southern Pacific?

464 A. Yes, sir.

Q. And also with regard to general rates in effect over the line between points on the Southern Pacific and the El Paso and Southwestern?

[Q] Yes, sir; what tariffs are furnished me.

Q. Now, I will ask you, Mr. Murdock, to state, if you know, the distance between Nogales, New Mexico, and Douglas over the lines of the Southern Pacific and the El Paso and Southwestern?

A. The distance is 159 4-10 miles, approximately.

Q. Do you know what the rate on beer in carload lots between these points is?

The Court: I don't see the materiality of that sort of an inquiry.

Mr. Phillips: May it please the Court, the plaintiff was allowed yesterday to go into the matter of comparison of rates between other points, now I think we have a right—

The Court: Common points in Colorado over the same line or other lines operated under the same conditions; we know nothing of the difficulties under which that road is operated; clearly evidence here of that sort would put the case in the situation where we never could reach a conclusion; that sort of evidence will be excluded.

Q. Do you know the distance from El Paso, Texas, to Deming, New Mexico, over the line of the Southern Pacific Company?

A. About 89 miles.

Q. Do you know the rate on beer between those points?

Plaintiff objects to the question as immaterial.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. Do you know the distance from ElPaso to Lordsburg, New Mexico?

465 A. Forty-nine miles.

Q. Do you know what the rate on beer is between those points?

Plaintiff objects to the question as immaterial.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Defendant offers to prove, may it please the Court, by this witness the distance from Douglas to Nogales, ElPaso to Deming, ElPaso to Boyd, also to Lordsburg; and we offer to show by this witness that there are no mountain ranges between those points, no mountain climb is involved; and we offer to show further that the rates on beer for the distances, none of which, with one single exception, are greater than this distance involved in this case, are from eight to twenty-three cents per hundred pounds higher.

The Court: The offer will be rejected.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

John J. Ivers, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. Please state your name, age, residence, occupation.

A. John J. Ivers; Denver, Colorado; 52; rate clerk in the Freight Agent's office of the Santa Fe road at Denver.

Q. I will ask you Mr. Ivers, if it is a part of your duty, growing out of your employment, to know and be familiar with the rates on various commodities between points on what are generally known as the Santa Fe lines?

A. Yes, sir.

Q. I will ask you

The Court: Is this the same kind of inquiry as the other witness?

466 Mr. Phillips: Yes, your honor.

The Court: Make your proffer.

Defendant offers to show by this witness the distances to various points, ranging from 146 to 174 miles from Albuquerque, New Mexico, and rates on beer between said points ranging from fifty-seven to seventy-seven cents per hundred.

The Court: Offer will be rejected.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Defendant also offers to show by this witness commodity rates on beer, carload lots, from Aztec, New Mexico, to Gallup, New Mexico, a distance of 158 miles, rate of 61 cents per hundred; and of beer in wood between Albuquerque and Gallup, New Mexico, a distance of 158 miles, to Wingate, New Mexico, a distance of 146 miles, a rate of 60 cents per hundred.

The Court: Offer will be rejected.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Defendants offers to show by this witness specific rates on beer in carload lots from Ash Fork, Arizona, to several points the distance ranging from 148 to 175 miles, ranging from 60 to 71 cents per hundred.

The Court: Offer will be rejected.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Defendant also offers to show by this witness rates on the same commodity from Winslow, Arizona, to Nelson and Pitt Springs, and distances ranging from 147 to 180 miles, with rates on beer in carloads ranging from 61 to 71 cents per hundred.

The Court: Offer will be rejected.

To which ruling of the Court the defendant by its counsel, then and there duly excepted.

467 Defendant also offers to show by this witness commodity rate on beer in carloads from Prescott, Arizona, to Phoenix, Arizona, a distance of 137 miles commodity rate 50 cents per hundred.

The Court: The offer will be rejected.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. Harrison: All those rates have been read to the jury and I apprehend that every one of them are to non-competitive points, the railroads charge what they please.

The Court: The jury will not take that into consideration at all.

R. A. Palmer, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. State your name, residence, age, occupation.

A. R. A. Palmer; Denver; 35; clerk in the General Agent's office of the Union Pacific Railroad.

Q. Do you have anything to do with the rates in that office, Mr. Palmer?

A. I have the tariffs in charge.

Q. You are the rate clerk in that office?

A. Yes, sir, I am the rate clerk.

Defendant desires to prove two rates by this witness, and I am prepared and desire to offer some evidence in regard to the hauling capacity of engines over that road as compared with the hauling capacity of the same class of engines over the Denver & Rio Grande Railroad between Pueblo and Leadville.

The Court: Make your proffer.

Defendant offers to prove by this witness the distance from Denver, Colorado, to Laramie, Wyoming, and the rate on beer in carloads between those points; also the distance from Denver to Hanna, Wyoming, and the rate on beer between those two points.

468 The Court: Offer will be rejected.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

J. W. Dean, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. State your name, age, residence and occupation.

A. J. W. Dean; Salida, Colorado; 57; division engineer on the Denver & Rio Grande.

Q. How long have you occupied that position?

A. A little over 20 years.

Q. Are you familiar with that portion of the line of railroad of the Denver & Rio Grande Railroad Company extending from Pueblo, Colorado, to Leadville, Colorado?

A. Yes, sir.

Q. Will you please describe that line of road to the jury?

A. Well, the line of road from Pueblo to Leadville follows the valley of the Arkansas in a generally northwesterly direction, staying pretty close along the stream nearly all the way; very much of the valley is quite narrow, and there is a great deal of canon work in it where the walls are close, very narrow, and it is very crooked and almost a continuous grade.

Q. When you say continuous grade, you mean up or down?

A. Up, all the time going up the river; Leadville isn't down in the valley, it is up on the hillside five miles away from the stream.

Q. Is Leadville on the main line of the Denver & Rio Grande Railroad Company or is it not? A. It is not.

Q. How far away from the main line is it?

A. About five miles.

469 Q. What is the altitude above sea level of Pueblo, Colorado, if you know?

A. 4668 feet is my recollection of it.

Q. What is the altitude of Leadville, Colorado above sea level?

A. 10200 feet, just a very little over 200 feet.

Q. Where does this five mile branch, that you speak of, which runs to Leadville, leave the main line?

A. At Malta.

Q. Is Malta higher or lower than Leadville?

A. About 600 feet lower.

Q. You say it is a steady uphill climb all the way from Pueblo to Leadville? A. Yes, sir.

Q. Where is the hardest part of that climb?

A. Between Malta and Leadville.

Q. Where is the next hardest part?

A. There are a good many other places where what is known as the maximum grade is reached; there is none east of Canon City, no maximum grade, but from Canon City to Malta in patches all along.

Q. What is the maximum grade? A. 1.42 per cent.

Q. Can you explain what you, as an engineer, mean by 1.42 per cent grade so that the rest of us who are not engineers can understand it?

A. If you go 100 feet you raise 1.42 feet, or practically, a foot and five inches.

Q. Is the line of railroad that you have been describing from Puebla to Leadville straight or otherwise?

A. It is remarkably crooked; a very crooked road.

Q. Is a line of road of that kind a cheap or expensive line to build through that part of the country?

470 A. It is a good bit more expensive than the open country, certainly.

[—]. Is that line of road between the points you have mentioned a cheap and easy road to maintain and keep in proper condition, or otherwise?

A. It is a difficult piece of road to maintain; in the summer time we are troubled with washouts from the streams on the lower end of the line; the middle portion of the line troubled with washins, and on the upper end of the line we are troubled with snow in the winter, so we are continuously fighting the elements.

Q. You spoke of the road being very crooked, what makes it crooked? A. The contour of the country.

Q. The country that it runs through? A. Yes, sir.

Q. You spoke of the Royal Gorge, now you mean by that the gorge in the canon of the Arkansas River above Canon City? A. Yes, sir.

Q. Where is this line of road built in that canon?

A. Built on the north side of the river.

Q. Down at the bottom along side the river?

A. From fifteen to twenty feet above low water.

Q. And it is the shape, naturally, of the surface of the country that makes that line crooked? A. Yes, sir.

Q. It wasn't built that way intentionally? A. No, sir.

Q. What effect has the fact that that line is very crooked have on the cost of maintenance as compared with a straight road, or one reasonably straight?

A. Now you take those curves the rail wears out very much faster; you take those sharp curves a rail won't wear
471 much over three years while if used on straight track it would wear twenty years.

Q. How about ties?

A. The track gradually spreads, and will what we call spike kill the ties and have to take them out; the rails have to be moved and the spikes taken out and put in so often in that one place that it will cut the tie in two.

Q. Does that condition occur more frequently, or more rapidly, in a very crooked track or straight track?

A. That spike killing is almost entirely on curves; practically all of it.

Q. Then the crook or curvature of a line of railroad has a direct bearing or influence on the expense of the maintenance of the road, has it? A. Yes sir, it has.

Q. You say this is a very crooked road up there?

A. Yes, sir.

Q. What is the maximum curvature in there, if you know?

A. 12 degrees.

Q. How much of that maximum curvature is there, should you say, on this line?

A. I don't know, but I should judge a couple thousand degrees of it.

Q. Are there few or many curves between Pueblo and Leadville?

A. There is something like six or seven hundred; haven't counted them up, there is certainly more than five hundred.

Q. How far is it from Pueblo to Leadville?

A. 157 miles.

Q. In that distance the number of curves is something over 500? A. Yes, sir.

472 Q. You have stated that the road rises from 4468 feet to 10200 feet? A. Yes, sir.

Q. Now you spoke of the maximum grade between Pueblo and Malta as being 1.42 percent, or practically one foot and five inches to the 100 feet?

A. Yes sir, or 75 feet to the mile.

Q. Now what is the maximum grade in this last five miles that you mention, from Malta into Leadville?

A. 3 per cent.

Q. Is that a grade easier or more difficult of operation?

A. Very much more difficult; you can haul just about half as much as they can on 1.42, or probably a little less than half.

Q. What is the maximum grade between Malta and Tennessee Pass? A. 1.42, same as it is east of Malta.

Q. Where does the main line cross the Continental divide?

A. At Tennessee Pass, about eight miles west of Malta.

Q. But the grade is twice as heavy going into Leadville, over twice as heavy, as going from Malta to Tennessee Pass?

A. Yes, sir.

Q. Was Leadville ever on the main line of the Denver & Rio Grande Railroad Company for the transportation of freight? A. No sir, never was.

Cross Examination

By Mr. Harrison:

Q. Your road regards Malta as a switching point, do you not, to Leadville?

A. Yes sir, that is the way it is handled.

Q. As a rule only a small number of cars at a time are taken from Malta to Leadville? A. Yes, sir.

Q. Sometimes one, sometimes two freight cars, or according to the amount of traffic?

A. Not according to the amount of traffic, as a rule; according to what the engine will take uphill, as a rule.

Q. Do they leave any traffic behind?

A. Not merchandise they don't; take them up immediately on its arrival and whatever it amounts to.

Q. All merchandise is treated in that way?

A. Yes, sir; handled promptly.

Q. Now, Mr. Dean, you stated the maximum grade at Tennessee Pass was 1.42?

A. Yes sir; the east side of the hill.

Q. What is the maximum grade between Malta Junction and Grand Junction? A. Going west?

Q. Yes? A. It would be minus three per cent.

Q. It is very nearly three per cent?

A. It is not for the simple reason that it is going down; if coming up it would be.

Q. You mean to say in crossing Tennessee Pass you go down when you strike the three per cent. grade?

A. You are going down.

Q. What is the grade of the road at the highest point?

A. 1.42 grade.

Q. Is that the highest place on the road crossing Tennessee Pass? A. Yes, sir.

Q. 1.42 grade? A. Yes, sir.

Q. What is the elevation of the road at the highest point on Tennessee Pass?

A. I don't recollect; it is very close to the same as Leadville.

Q. Very close to the same as Leadville?

A. Yes, sir.

Q. Wouldn't that make it higher then than 1.42?

A. No sir, it is much further away.

Q. What is the distance between Malta Junction and Tennessee Pass at the highest point?

A. Between eight and nine miles.

Q. You say it is about five miles from Malta to Leadville?

A. By the track it is about five miles.

Q. Now, Mr. Dean, what is the maximum grade between Grand Junction and Salt Lake City?

A. I don't know, that is off of my territory.

Q. Don't you know independent of your territory what the maximum grade is? A. No I don't.

Q. Don't you know it is about four per cent?

A. I know it is not.

Q. Haven't you been over that road frequently?

A. No sir, probably five or six times.

Q. And how does that portion of the road compare, as to curves and grades, with the road between Pueblo and Leadville?

A. Well the grades are considerably better as far as what is known as Helper; about half of the Rio Grande Western; the grades is considerably better and the curvature is nothing like as much.

Q. Nothing like as much; go over the main range and through canons do they not?

A. But you asked from Grand Junction.

Q. I am talking now about the road from Grand Junction to Salt Lake? A. That is what I answered.

Q. The curvatures and grades are very much better
475 than they are between Pueblo and Leadville?

A. Yes, going west; coming east they have a short pull, I think, of four per cent.

Q. So that coming east from Salt Lake the maximum grade is four per cent?

A. I think it is for a short distance; they have a helper crew there.

Hugh Wilson, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. State your name; age; place of residence; occupation.

A. Hugh Wilson; Salida, Colorado; 32; Assistant superintendent Denver & Rio Grande Railroad.

Q. Are you acquainted with the line of railroad of the Denver & Rio Grande Railroad Company between Pueblo and Leadville, Colorado? A. Yes, sir.

Q. You may describe that line in general?

A. It is what is known among railroad men as a mountain railroad; very crooked; continuous upgrade almost; it is overhung in a great many places by high walls of rock; in a great many places is close to the running stream where subject to overflow and washout; at other points the topography of the country is such that the rains wash down considerable deposit on the track and cover it; the rock walls are so close to the track that the effects of frost and the elements cause rock to come down continually causing interruptions to traffic and expense to the company; the line continues uphill to Leadville, which is about on top of the continental divide; the altitude there is such that during four or five months of the year we are frequently bothered with snow. The general topography of the road is such that we can't handle the tonnage with a cer-

tain class of engines that what are known as prairie
476 roads can; we handle from forty to fifty per cent of
what other roads can handle with the same class of en-
gines.

Q. From forty to fifty per cent of what other roads can
haul with the same class of engines, to what part of the road
are you referring?

A. To the main line from Pueblo to Malta.

Q. Now how is it with respect to that portion of the line
from Malta to Leadville?

A. We are able there to handle just a little less than half
what they can handle on the main line with the same class of
engines.

Q. So if you take an engine that would haul a maximum
on level track it would take about half from Pueblo to Malta
and then have to take two trips from Malta to Leadville to get
the same tonnage in? A. Yes, sir.

Q. Now, Mr. Wilson, what has been your railroad experi-
ence aside from your employment on the Denver & Rio Grande,
have you worked for other railroad companies?

A. Yes sir; worked in the capacity of trainmaster for the
Burlington on the Nebraska lines; acted as superintendent on
the Missouri Pacific, in that capacity handled transportation;
also handled track work on the Burlington in previous years
in the capacity of section foreman and roadman.

Q. You spoke of the Burlington lines in Nebraska, is that
a mountain road or what you call a prairie road?

A. What is known as a prairie road.

Q. Then you have had actual experience on both prairie
and mountain roads? A. Yes, sir.

Q. And you are speaking from actual experience and your
own personal knowledge when you are making comparison be-
tween prairie and mountain roads, are you?

477 A. Yes, sir.

Q. You may state what the maximum grade is?

A. About 1.42 per cent from Pueblo to Malta, something
over seventy feet to the mile raise. The maximum grade be-
tween Malta and Leadville is three per cent, a little over 150
feet to the mile raise.

Q. Now you stated that the road was very crooked between
Pueblo and Leadville all the way up? A. Yes, sir.

Q. Now what effect, if any, has these grades that you speak
of and the crookedness of the road on the cost or expense of
maintenance and operation of a road of that kind? Is the ex-
pense of maintenance and operation greater or less than it
would be in a road where you didn't have to go up those grades
and was straight? A. It makes the expense greater.

Q. What effect has the crooked character of the road on the maintenance?

A. It results in more frequent renewals of rail and material than required in a straight track; certain class of rails will last twenty years on straight track, while on the very sharpest curve will possibly last only two years, in fact we have made renewal in eighteen months in the very sharpest curves; down to the least possibly last six or eight years.

Q. But the general effect of high curvature is to make the road more expensive to maintain and operate? A. Yes, sir.

Q. What is the general course of handling the freight business from Pueblo to Leadville, I mean so far as the operating department is concerned, what is done with it?

A. The freight traffic is handled in trainload lots from Pueblo to Malta and over Tennessee Pass; the Leadville
478 business is shoved out at Malta and taken by another crew from Malta to Leadville.

Q. So there is a double handling of two trains involved?

A. Yes, sir.

Q. And you say that an engine of the same class could only haul about half as much freight into Leadville as it could haul to Malta?

A. Yes sir; I might say that they are not able in that service to use the heavy road engine, compelled to use a lighter engine on account of the grades and the class of work. The engine we use will handle about two-thirds of the tonnage that the same engine we use on the main line would handle on the same grade.

Cross Examination

By Mr. Harrison:

Q. You say you are stationed at Salida?

A. Salida, yes sir.

Q. You know anything about the conditions as they exist at Malta with reference to how the cars of merchandise are shipped from Malta to Leadville? A. Yes, sir.

Q. Is it not a fact that at no time shipments of merchandise to Leadville are of such an extent or of such quantity that they cannot all be carried by one of these engines that run between Malta and Leadville?

A. Seldom ever can't be; occasionally there is one car more than they can carry; once in a long while there is one left there; handle four cars there, on the main line twenty-five or six.

Q. The rule is to handle four cars, the capacity of the engine is sufficient to carry all the merchandise delivered at Malta? A. No, not always.

Q. Occasionally it doesn't?

A. Occasionally an overflow car.

Q. How do you acquire your information with reference to those grades and curves? Are you an engineer?

479 A. Yes, I am a civil engineer.

Q. You have been over this road with your instruments?

A. No sir, I obtained my information from the engineering department.

Q. You know what the maximum grade is between Malta and Grand Junction?

A. The maximum in which direction?

Q. Going west. A. 1.42 per cent.

Q. What coming east?

A. Is three per cent., or 150 feet for a distance of twenty miles or more.

Q. What is the maximum going west from Salt Lake City?

A. I am not familiar with that part of the road.

Q. The eastern roads coming into Denver have troubles with washouts on the Missouri River, do they not?

A. Some, yes.

Q. Very serious, don't they?

A. Not all of them, not in comparison with the mountain roads.

Re-direct Examination

By Mr. Phillips:

Q. Mr. Wilson, you stated on your cross-examination to Judge Harrison, that the engine which was used to haul this business between Malta and Leadville could usually handle all that was offered, did you mean by that that it could handle all the business going into Leadville in one day on one trip or that it usually took up what was brought in in one train?

A. Yes, sir. It could handle the Leadville portion of the train that was set out at Malta.

Q. How many trains?

A. From five to seven trips a day, depend on conditions.

Q. Do they usually do that?

A. We don't handle them that way; we work five crews in the territory; certain crews have certain assigned work
480 to do; there are probably as high as eighteen trips per day made to handle all freight to and from Malta to Leadville; that is, eighteen round trips, I couldn't say exactly.

Q. Your impression is that there are about eighteen round trips made for the purpose of handling the business between those points? A. Yes, sir.

Re-cross Examination

By Mr. Harrison:

Q. What does a crew consist of?

A. Well when I speak of a crew we mean engineer, fireman, conductor and two brakemen.

Q. Have a conductor between Malta and Leadville?

A. Two class of employes, certain engines have what they call foreman, corresponds with the conductor.

Q. The engineer and foreman do this work of transportation between Malta and Leadville?

A. No sir, the crew consists of five men, the entire crew.

Q. What do the other three do?

A. Engineer, fireman, foreman or conductor, in charge of the engine, two switchmen or brakemen. It is a special train service district.

Q. Is there very much difference between delivering the cars from Malta to Leadville and the ordinary switching proposition in a city? A. Considerable, yes sir.

Q. Isn't it a fact that cars are delivered at Denver that have to be switched three or four miles before they reach the place where they are unloaded?

A. I am not familiar with Denver, but I presume there are places where they have to run that far.

Q. Isn't it a fact that at every terminal point switching propositions have to be maintained, engines and tracks to deliver cars upon? A. Yes, sir.

481 Q. And it is simply a difference in the distance or the length of the switch, is it not, as compared with the distance between Malta and Leadville, aside from your curves and your grade?

A. It isn't a switching proposition; not what we call a switching proposition.

Q. I am only comparing the cost of it with the cost of an ordinary switching proposition?

A. It cannot be compared with Denver because there are no grades here.

Q. Suppose the grades were the same and the curves the same, isn't it simply a difference in distance or the length of the switch that we would have to take into consideration in determining the extra cost?

A. It is a branch line haul.

Q. You can call it a branch.

A. It is very nearly three miles to the first industry track.

Re-re-direct Examination

By Mr. Phillips:

Q. Mr. Wilson, I will ask whether the country through which the line of the Denver & Rio Grande Railroad runs from

Pueblo to Leadville is thickly settled or sparsely settled country? A. It is sparsely settled.

Q. Are there many or few towns along there?

A. There are three or four small towns running from one to two thousand inhabitants.

Q. I will ask whether Malta is commonly looked upon as a suburb of Leadville? A. No sir, I don't think it is.

Q. Is the country or the space of several miles between Malta and Leadville thickly settled, as a city would be, or like a city and its suburbs?

A. No sir, no connection between the two; no village there.

Q. Do you know from your railroad experience, or did
482 you ever hear of a proposition where a haul of four or five miles up a three per cent grade, across a barren country was compared, or could be compared, with a switching service in a city of two hundred thousand inhabitants?

A. No, sir.

Re-re-cross Examination

By Mr. Harrison:

[A.] Mr. Wilson, there is a branch line west of Leadville isn't there, called the Blue River branch? A. Yes, sir.

Q. That operates between Dillon and Leadville?

A. Yes, sir.

[—] Through Robinson, Kokomo and Frisco?

A. Yes, sir.

Q. There is also a smelter known as the Arkansas Valley Smelter between Malta and Leadville, is there not?

A. Yes, sir.

Q. What proportion of the traffic from Malta goes to this smelter and to points beyond Leadville for supplying the mines, the Ibex and other prominent mines, with their merchandise and other supplies that go to Dillon, Frisco and Robinson?

A. I should say about eighty per cent; I couldn't answer that unless I had figures; possibly fifty per cent out of Malta goes to the Arkansas Valley smelter and fifty per cent, probably, to points beyond that; the Blue River traffic is extremely light.

Q. Well, that wouldn't leave anything for Leadville, you say fifty per cent to the smelter and fifty per cent beyond Leadville? A. No, I meant beyond the smelter.

Q. What proportion of the fifty per cent that goes beyond the smelter would go to Leadville, stop there?

A. Fifty per cent that would go to points beyond the smelter.

Q. What proportion of that fifty would be destined to points beyond Leadville, to Robinson, Frisco and Dillon?

483 Defendant objects to the question as immaterial, and not proper cross-examination.

The Court: I don't see the materiality or propriety of the cross-examination.

Mr. Harrison: Simply with a view of meeting the main defense as to the physical condition of this cut off between Malta and Leadville.

The Court: If that appears to be material you may cross-examine later.

Mr. A. J. Wharf, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

[—] State your name, age, place of residence and occupation?

A. A. J. Wharf; Cheyenne, Wyoming; 32; division superintendent on the Union Pacific Railroad, Cheyenne Division.

Q. What portion is included in the division over which you have jurisdiction?

A. From North Platte, Nebraska, to Rawlins, Wyoming, including a short branch in Nebraska.

Q. Does that line include the portion of the line of the Union Pacific railroad which goes over all or part of the Rocky Mountains?

A. It includes that portion which goes over Sherman Hill portion of the Rocky Mountains.

Q. What is the Sherman Hill of which you spoke?

A. Well Sherman Hill is ordinarily called an extension of the black hills range that comes down into Wyoming.

Q. Does the Union Pacific in the Wyoming Division over which you have jurisdiction, reach the highest point which it reaches in crossing the range? A. Yes, sir.

Q. At what point? A. At Sherman, Wyoming.

Q. What is the elevation of that point above sea level?
484 A. 8010 feet.

Q. What is the elevation above sea level of Cheyenne?

A. 6050 feet.

Q. You say that Sherman is the highest point reached by the Union Pacific in crossing the mountains?

A. It is.

Q. What is the character of the line of the Union Pacific, say from Cheyenne to Sherman, as to grade; is it uphill or down? A. It is uphill.

Q. Now, do you know whether or not the Union Pacific has a class of freight engines known as C 57, cylinders 22 by 30, weighing 187,000 pounds on the driver?

A. They have.

Q. What sort of engines are the engines of that class as compared with the other freight engines in use on the Union Pacific?

A. That is our heaviest type of freight engines.

Q. Heaviest type of freight engine used on that division?

A. Yes, sir.

Q. Do you know, or have you in your possession any official publication of the Union Pacific Railroad Company furnished to you for your information as an officer or employe of that road, which gives the rating in tons of dead freight which the engine of that class can haul up to the top of the highest point which the Union Pacific reaches above sea level in crossing the mountains? A. I have that.

Q. You have such publication?

A. I have such publication.

Q. Will you state from that the number of tons of dead freight which that class of engines can haul up to the top of that highest point above sea level which the Union Pacific Railroad reaches? A. 1100 tons.

No cross-examination.

485 David M. Knox, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. State your name, age, place of residence, occupation.

A. David M. Knox; Denver; 36; mechanical engineer for the Denver & Rio Grande Railroad Company.

Q. As mechanical engineer of the Denver & Rio Grande Railroad Company is it a part of your duty to determine and to know the ratings in tons of dead freight which engines of the Denver & Rio Grande Railroad Company can pull over various portions of the system? A. It is.

Plaintiff objects to this line of testimony; don't understand that it has anything to do with the case at all.

The Court: What is the materiality of it?

Mr. Phillips: We desire to show by this witness, following the testimony of the last witness, the reasonable character of the freight rates charged, and showing evidence upon which the jury may state that our freight rates are reasonable.

The Court: What do you understand that to be?

Mr. Phillips: Understand the circumstances of constructing the road, the expense of operation, of handling, physical obstacles in the way of the operation of the road.

The Court: I think, in a general way, does it maintain such rates as to make a fair return of a net income on the capital invested.

Mr. Phillips: Taken as a whole, if the entire body of rates of the railroad company were called in question, that is true; I wouldn't understand that it is possible to go into that particular matter which the Court has suggested in regard to any one particular rate standing by itself.

The Court: I don't think any one particular rate would solve the inquiry at all; I don't know, of course, what additional evidence you intend to offer, but I can't understand that the simple fact that a part of the road may be mountainous, or in fact, all of it mountainous and difficult to maintain, is any aid to determine whether the rate was unreasonable I think we should know the net income, and if it is such a net income as would pay a reasonable return on the investment. So much time devoted to this particular item doesn't seem to go very far to aid us in solving the inquiry—that is, whether or not thirty cents, as required by the Commission, is reasonable, or whether or not forty-five cents is an unreasonably high rate. I think I will let you answer this question, because I don't know what you have in mind.

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Q. Is it a part of your duty to determine that rating?

A. It is.

Q. Do you know the style of engine which is in use by the Union Pacific Railroad Company which is known as C 57, 22 by 30 and weighing 187,000 pounds upon the drivers?

A. Yes, sir.

Q. Has the Denver & Rio Grande Railroad Company any engines in its service of similar, or substantially similar capacity? A. It has.

Q. What engines are those?

A. About 68 engines substantially the same, known as the 225, cylinders 23 by 28, same size drivers, weight on drivers about 194,000 pounds; heating surface is practically the same; substantially the same engine.

Q. Have you determined and do you know the official rating in tons of dead freight which the Denver & Rio Grande engines that you have mentioned can haul over that portion

of the line of the Denver & Rio Grande Railroad between Salida and Malta? A. 700 tons.

487 Q. Do you know, or have you determined, the rating for the same engines over that portion of the line of road of the Denver & Rio Grande Railroad Company between Malta and Leadville?

A. That engine doesn't operate there, but I know we would have to deduct over half; about 335 tons for a three per cent grade; the same engines work in the pushing service on the other side of the hill.

Q. Do you know the character of the line of the road of the Denver and Rio Grande Railroad between Pueblo and Leadville? A. I do.

Q. Is it a straight road? A. Very crooked.

Q. What effect, if any, has this crooked character of the road, or the high curvature, upon the expense of maintenance of motive power, or engines, as compared with engines operating over a comparatively straight road or lower curvature?

A. Very considerable; on a prairie road the entire wear is always on the tread directly over the middle of the rail, while on a mountain road is on the flange of the rail and wears out the tires before the other machinery would be worn out. Also lateral motion is very much affected on the crooked road.

Q. Does that make it more or less expensive to keep motive power in repair? A. Much more expensive.

Q. Mr. Knox, I will ask you if you have ever made, or taken part in making of any experiments for the purpose of procuring, by instruments for that purpose, of a graphic delineation of the line of railroad of the Denver & Rio Grande Railroad Company between Pueblo and Leadville, or any part of that line, which would show in a general way the amount and character of the curvature? A. Yes, sir.

488 Q. Will you please state what those experiments were?

A. The dynamometer car of the International Correspondence Schools passed over the road; automatically takes note of the amount of curvature, showing continuous curves and reverse curves. The hauling capacity is affected by little curves, or short curves, or whether they are continuous; if you have a short curve, or one curve, you can run that the same as you can run a short hill, it cuts down the hauling capacity. I have a point there to show what was taken in that district.

Q. Do the instruments which were used in connection with that car make a permanent record?

A. Yes sir, a permanent record in ink on tracing paper from which this was made.

Q. Were you present when that record was made, on the car? A. Yes, sir.

Q. Showing the continuous character of the curves on this line of road, over all or a portion of this line of road, between Pueblo and Leadville? A. I have a copy.

Q. Will you please produce it? A. Yes, sir.

Q. Now, Mr. Knox, can you point out from that record which you have there the character of record which is made by the instrument on a straight or comparatively straight track?

A. Almost straight, just a slight variation due to the oscillation of the car.

Q. Will you indicate on this record where that is?

A. In the neighborhood—

The Court: What is the use of going into the detail of that, Mr. Phillips? You have had the witness stating what we all know.

Mr. Phillips: Showing the continuous character of the curvature of this line, and it is not necessary to go into this now if it is satisfactory to have the witness explain the different characters of record made on there.

The Court: Witnesses have already said it was substantially a continuous curve from Pueblo to Leadville.

Cross Examination

By Mr. Harrison:

Q. Mr. Knox, you said that the engines operating on the cut off between Malta and Leadville could not carry to exceed 3500 tons?

A. A good deal less than that, about 335 tons.

Q. 335 tons?

A. About that; about half, perhaps a little less.

Q. Is it not a fact that under no circumstances would that much merchandise ever move between Malta and Leadville?

A. That is out of my province altogether; I am not acquainted with the operating end of the road.

Q. Do you know how many cars of merchandise that would ordinarily require?

A. Merchandise loads average about half the capacity of the car; sixty thousand pound cars on our railroad will run about thirty-five thousand pounds to the load, that is about the average load; we move empties and loads; add up all dead tonnage it comes to just about fifty per cent of the hauling capacity of the cars.

Q. Is it not a fact that the merchandise tonnage rarely exceeds thirty thousand pounds, from twenty to thirty thousand?

A. Probably; yes, I think that would be probably fair on furniture and that kind of stuff.

Q. So 350 tons would mean some ten cars at least of merchandise?

A. No sir; you are not taking into consideration the weight of a car, a loaded car weighs about thirty tons.

490 Q. You include then in the seven hundred and three hundred and fifty ton capacity of that engine the weight of the car, do you?

A. Yes sir; weight of the engine, tender and caboose.

Q. So then it would be three hundred and fifty tons including the weight of the car? A. Yes, sir.

Q. And that would mean five or six cars, perhaps, of merchandise?

A. If we use one of the 220 class engines.

Q. And you do use that class engines on that cut off?

A. No, sir.

Q. You don't know anything about the extent of the traffic between Malta and Leadville at all?

A. No sir, nothing whatever.

Edward R. Murphy, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

491 Q. State your name, age, place of residence, occupation.

A. Edward R. Murphy; 64; Metropole Hotel; general auditor Denver & Rio Grande Railroad.

Q. How long have you occupied that official position with the Denver & Rio Grande Railroad Company?

A. Twenty-seven years.

Q. Mr. Murphy, as general auditor are you in general charge of all the books and accounts of the company?

A. Yes, sir.

Q. I will ask you, Mr. Murphy, to state whether or not there has been any change or difference, either increase or decrease, in the expense of the Denver & Rio Grande Railroad Company in the matter of wages paid to its employes engaged in the operation of its road? A. Yes, sir.

Q. Has there been such change between the year 1902 and the present year? A. Yes, sir.

Q. Has that change been an increase or decrease in the rate of wages paid? A. An increase.

Q. Has that increase been uniform for all classes of employes, or has there been a difference?

A. Different percentages of increase in different classes of labor.

Q. In what particular classes of labor have those increases been the most marked and the most prominent?

A. In the station yardmen, engine and trainmen, trackmen; other laborers and employes do not show any increase.

Q. Are you able to state, in a general way, what the percentage of increase has been for all classes of employes for the present year as compared with the year 1902?

A. Yes, sir.

Q. Will you please do so?

492 A. The increase in wages in 1908 over 1902 on all classes of laborers except general officers and general office clerks was 15.45 per cent more per day than in 1902.

Q. Now is there any other increase which tends to make a change in the percentage of excess of labor?

A. The sixteen hour law has increased the force so that the average pay would be increased about 1.52 per cent, making the total increase in excess of wages alone nearly 16 per cent.

Q. Have you prepared a statement from the books and accounts of the company which shows the rate of increase for the different classes of labor which you have mentioned, and the total increase? A. Yes, sir.

Q. Is that statement correct as shown by the books of the company?

A. It is a calculation made from the records of the company, the total wages represents the wages of the whole road except general officers and general office clerks, everybody that operates the road, and the excess is a little over eight millions in 1908.

Q. And the percentage of increase over 1902 was as you have stated? A. That increase is 15.45 per cent.

Q. Does your statement show additional increase under the sixteen hour law?

A. It wasn't made until the first of July last.

Q. Will you please state for the information of the jury what you refer to as the sixteen hour law?

A. The sixteen hour law doesn't allow certain classes of employes to work over sixteen hours; trainmen, telegraph operators, etc., and that in the four months makes the increase in the entire pay of the road of about $1\frac{1}{2}$ per cent, 1.52.

Q. Then, except for the estimate which you have just
493 mentioned, this statement which you have contains the figures shown by the books of the company and a correct computation made from those figures showing the increase? A. Yes, sir.

Defendant offers statement in evidence, and asks that it be marked Defendant's Exhibit 5; said exhibit 5 being in words and figures as follows, to-wit:

Deft Ex. 5

494

THE DENVER AND RIO GRANDE RAILROAD COMPANY.

TOTAL NUMBER OF DAYS WORKED, YEARLY COMPENSATION AND AVERAGE DAILY WAGE OF ALL EMPLOYEES (EXCLUDING GENERAL OFFICERS AND GENERAL OFFICE CLERKS) FOR THE FISCAL YEARS ENDED JUNE 30th 1902 AND 1908, AND THE INCREASE PER CENT OF AVERAGE DAILY WAGE DURING THE PERIOD.

	1902			1908			Increase per cent Average Daily Wage 1908 over 1902
	Days Worked	Yearly Compensation	Average Daily Wage	Days Worked	Yearly Compensation	Average Daily Wage	
STATION AND YARDMEN							
Station Agents.....	55,115	\$ 145,639.36	\$2.64	57,670	\$ 158,125.33	\$2.74	3.79
Switch Tenders & Watchmen.....	134,320	343,235.85	2.56	119,720	404,646.55	3.38	32.03
Telegraph Opr's & Dispatchers.....	73,365	200,368.04	2.73	68,985	208,323.51	3.02	10.62
Other Station Men.....	169,360	310,688.29	1.83	203,670	399,804.19	1.96	7.10
Total.....	432,160	\$ 999,931.54	\$2.31	450,045	\$1,170,899.58	\$2.60	12.55
ENGINE AND TRAINMEN							
Enginemen.....	150,745	\$ 717,128.61	\$4.76	163,885	\$ 876,791.71	\$5.35	12.39
Firemen.....	159,870	470,951.11	2.95	163,885	582,167.12	3.55	20.34
Conductors.....	97,090	381,134.50	3.92	97,455	494,870.88	5.08	29.59
Other Trainmen.....	216,445	533,294.93	2.46	190,895	681,624.50	3.57	45.12
Total.....	624,150	\$2,102,509.15	\$3.37	616,120	\$2,635,454.21	\$4.28	27.00
SHOPMEN							
Machinists.....	126,672	\$ 297,897.64	\$2.35	148,512	\$ 467,319.73	\$3.15	34.04
Carpenters.....	115,752	288,951.69	2.50	111,384	312,575.05	2.81	12.40
Other Shopmen.....	317,616	691,038.03	2.18	462,072	1,185,267.78	2.57	17.89
Total.....	560,040	\$1,277,887.36	\$2.28	721,968	\$1,965,162.56	\$2.72	19.30
TRACKMEN							
Section Foremen.....	129,940	\$ 246,073.58	\$1.89	131,400	\$ 270,025.20	\$2.05	8.47
Other Trackmen.....	578,136	840,161.49	1.45	488,592	751,720.12	1.54	6.21
Total.....	708,076	\$1,086,235.07	\$1.53	619,992	\$1,021,745.32	\$1.65	7.84
OTHER EMPLOYEES & LABORERS							
Total.....	459,264	\$1,016,451.29	\$2.21	563,472	\$1,211,869.29	\$2.15	2.71
Grand Total.....	2,783,690	\$6,483,014.41	\$2.33	2,971,597	\$8,005,130.96	\$2.69	15.45
With increase deducted					6,933,851		
Increase					1,071,279		
Increase 16 hour law					105,464		
Total increase					\$1,176,743		
					15.45%		
					1.52		
					16.97%		

495 Q. Mr. Murphy, I will ask you what percentage of the total expense of the operation of the Denver & Rio Grande Railroad Company is taken up by wages?

A. In 1902 it was 67.73 per cent; in 1908 66.71 per cent; substantially two-thirds of our expense is labor.

Q. Now I will ask you if, during the period of time covered by the statements showing the increase in wages which you have produced, there has been any marked increase in other matters of expense to the company, such as purchase of materials, say cross-ties, for instance, has there been an increase in the cost of ties?

A. Yes sir, that increase occurred since June 30, 1903; the average cost of a tie in 1903 was forty cents and in 1908 72.1 cents per tie, an increase of seventy-eight per cent; that is the average.

Q. The rate of increase then has been as you said, seventy-eight per cent?

A. Seventy-eight per cent between 1903 and 1908.

Q. Can you state in figures what that rate of increase meant in dollars and cents to the Denver & Rio Grande Railroad Company this year as compared with previous years that you have mentioned?

A. It makes an increase in the cost of ties for the year of \$194,277.61.

Q. Is there any one particular item which has contributed more than any other to that increase?

A. Freight over the Oregon Short Line and its connections northwest of Portland has made most of this average increase in the cost of ties.

Q. State, if you know, what occasioned that increase in freight rates for these ties?

A. The Hepburn Act of August 28th; we paid 21.63 per tie and since the Hepburn Act we have paid 37½ cents
496 per tie, an increase of 15.87 cents, or 73.77 per cent.

Q. Do you know if there has been any increase during the same period of time in the cost of fuel coal used in the operation of the road?

A. Yes sir; it is a different period, the increase took place after June 30, 1906, and therefore that year is taken for comparison with 1908.

Q. Has there been an increase in the cost of coal?

A. Yes, sir.

Q. What has that increase been?

A. The cost per ton in 1906 was 1.482 and in 1908 1.68 per ton, being an increase of 13.36 per cent.

Q. Do the expenditures for coal, ties and labor represent the bulk of the expenditure for operation of the road?

A. Very largely so. Of course we have got rails and other expenditures, but no increase in those items up until 1908, no recent increase.

Q. No increase in the cost of rails? A. No.

Q. In the case of miscellaneous supplies, such as shop materials, lubricating oils, matters of that kind?

A. Yes sir, there has but couldn't tell you what that increase is exactly.

Q. Can you state in a general way?

[Q]. It run about five per cent, outside of these items the increase was about five per cent on the material.

Q. Those two items represent the bulk?

A. These two items represent the heavy expense in material.

Q. I will ask you to state, Mr. Murphy, if you are able to do so, about the proportion as far as quantity is concerned between the common and preferred stock of the Denver & Rio Grande Railroad Company?

497 A. My memory on figures is pretty bad; I think the common stock is 38,000,000 and I don't know whether I can tell you—have you an annual report of our company?

Q. I don't think I have.

A. I can't remember.

Q. In general, is the preferred stock about half of the total, or a little over half?

A. No, it is not half.

Q. The preferred stock is less than half of the total?

A. No, I think the preferred stock is a little more.

Q. The preferred stock is a trifle more? A. Yes, sir.

Q. Has the Denver & Rio Grande Railroad Company ever paid any dividend on its common stock? A. No, sir.

Q. Has it ever paid any dividend in excess of five per cent on its preferred stock? A. No, sir.

Cross Examination

By Mr. Harrison:

Q. The Denver & Rio Grande Railroad Company has recently bonded its lines for \$150,000,000, hasn't it?

A. I can't answer that question yes or no because there has been paved the way for an issue of \$150,000,000, bonds but none of it has been issued.

Q. Propose to do that?

A. Propose to do that; \$90,000,000 to take up obligations that will expire in 20 or 30 years; the other \$60,000,000 is to go into improvements on the track.

Q. Isn't it a fact that all information which you have been testifying to is furnished to the Interstate Commerce Commission for their information? A. Yes, sir.

Q. And is a part of their records?

498 A. Yes sir, most of it.

Q. All of this testimony that you have been giving is in their office?

A. The increase of labor has been furnished to the Interstate Commerce Commission, excepting the percentages, they don't have that.

Q. The data is there for them to figure percentages if they desire to do so? A. Yes, sir.

Q. When did this increase in labor expense first begin?

A. It began some of it in 1904, and there was some in 1905 and 1907; I think the largest increase occurred either in the latter part of 1906 or the first part of 1907 when the wages all over the country were raised.

Q. Then if the rate for the transportation of beer in car-load lots from Pueblo to Leadville was 45 cents between 1902 and 1904, and it has remained 45 cents ever since, it was either too high before 1904 or is too low now, is that what you mean to convey to the jury?

A. I haven't conveyed anything like that.

Q. Your road maintained a rate of forty-five cents prior to 1904, before these expenses increased at all?

The Court: Did he say anything about that 45 cent rate on beer?

Mr. Harrison: I think not.

The Court: Well, you can't inquire about that.

Q. What proportion of this increase had occurred prior to March, 1907, with respect to labor? A. I couldn't tell you.

Q. Did the greater part of it occur prior to that time or since?

A. I should say the greater part of it occurred since.

Q. Now, in respect to ties about which you testified, when did that expense occur?

499 A. That occurred right away after the Hepburn Act, August 28, 1906; prior to that railroads had a rate on railroad material which was good for all railroads; after that act that was abolished and railroads pay tariff rates for company use.

Q. So that that increase of expense began in the latter part of 1906?

A. Yes sir, in August, I think about the first of September.

Q. In fact all increase in expenses that you have referred to occurred later than 1904, and most of it later than 1907, did it not?

A. Most of it later than 1906; a little since 1903, there was a little in 1903, but most of it since 1904.

George H. Kaub, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. State your name, age, place of residence and occupation?

A. George H. Kaub; 1737 Gaylord, Denver, Colorado.

Q. Are you connected, Mr. Kaub, in any official capacity with the Denver Brewers Association? A. Yes, sir.

Q. In what capacity? A. Assistant Secretary.

Q. Does the Denver Brewers Association take in in its membership all the brewers of beer in and around Denver, or in Denver?

A. All in Denver and some outside.

Q. Now, I will ask you, Mr. Kaub, if through your business and official connection with the Denver Brewers Association you have had occasion to look into the question of railroad rates on beer?

500 A. I have.

Q. And have you had occasion to look into the rates of the Denver & Rio Grande Railroad Company on beer in the state of Colorado? A. Very often.

Q. I will ask you to state, Mr. Kaub, whether in your opinion a rate of forty-five cents on beer in carload lots between Pueblo, Colorado, and Leadville, Colorado, is a reasonable rate?

Plaintiff objects to the question as immaterial.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. I will ask you, Mr. Kaub, to state what would be the effect on the brewery interests of Denver of the establishment of a lower rate on beer from Pueblo, Colorado, to Leadville, Colorado, over the lines of the Denver & Rio Grande Railroad Company than exists over the lines of the same company between Denver and Leadville?

Plaintiff objects to the question as immaterial.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

John W. Morey, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. State your name, age, place of residence and occupation?

A. John W. Morey; 717 Madison St.; secretary-treasurer of the C. S. Morey Mercantile Company.

Q. That company is engaged in the wholesale business in Denver? A. Yes, sir.

501 Q. That company is engaged in shipping freight generally out of Denver through the state of Colorado?

A. Yes, sir.

Q. Have you, in your official capacity as an officer of the C. S. Morey Mercantile Company, had occasion to look into the question of railroad rates, and the reasonable character of railroad rates, in the state of Colorado and through the state of Colorado, from eastern points to interior points in the state? A. To a limited extent only.

Q. Have you had occasion to look into and to know and determine in your mind to your own satisfaction in your own business the effect of different railroad rates on your business?

A. Yes, sir.

Q. Will you please state, Mr. Morey, what would be the effect on your business of the establishment of lower freight rates to Leadville and to the interior of Colorado on merchandise from Pueblo over the lines of the Denver & Rio Grande Railroad Company than exists over the same line from Denver?

Plaintiff objects to the question as incompetent, irrelevant and immaterial.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Q. Please state, Mr. Morey, what, in your opinion, would be the effect on the wholesale and manufacturing interests of the city of Denver of a reduction on merchandise rates from Pueblo to the interior points of Colorado below the rate prevailing from Denver on the same commodities?

Plaintiff objects to the question as incompetent, irrelevant and immaterial.

502 Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Chauncey Cowell, being first duly sworn on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Phillips:

Q. Please state your name, age, place of residence, and occupation?

A. Chauncey Cowell; 56; 1215 Humboldt St.; secretary of the Struby Estabrook Wholesale Grocery Company.

Mr. Phillips: I desire to offer the same line of evidence and to ask the same questions of this witness that I have of the two or three preceding witnesses; make the offer in this way to save time.

The Court: The offer will be rejected.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. Phillips: I desire to offer in evidence that portion of the Act of Congress approved June 29, 1906, found in section 2 thereof, which amends and reenacts the act of February 19, 1903.

The Court: What is the object of offering it in evidence? The Court takes judicial notice.

Mr. Phillips: I desire to offer it in evidence and desire to state it to the jury.

The Court: What section is that?

Mr. Phillips: The first section of the Elkins Act as amended in the the Act of June 29, 1906, known as the Hepburn Act, and the latter part of section 2 thereof reenacting, with certain amendments section 1 of the Elkins Act, and I desire to offer a part of that section, reading as follows: "The wilfull failure upon the part of any carrier subject to said

Acts to file and publish the tariffs or rates and charges
503 as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense."

Plaintiff objects to the offer.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. Phillips: I also desire to offer in evidence a portion of the same act of June 29, 1906, found on page 590 of Vol. 34, Part 1, of the Statutes at Large, being a part of Sec. 16 of the Act to Regulate Commerce as amended; the part which I desire to offer reads as follows: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: Provided, That claims accrued prior to the passage of this Act may be presented within one year."

Plaintiff objects to the offer.

Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant rested its case.

And the above and foregoing is all the evidence given, offered or received upon the trial of said cause.

And thereupon the defendant moves the Court for a directed verdict for the following reasons, to-wit:

1. That the petitioner has failed to prove that it has any right under the statutes and laws of the United States of America to maintain this action, and especially that the petitioner has failed to prove that the rates complained of by the petitioner in its petition herein have been changed 504. according to law, or were so changed according to law prior to or contemporaneously with the promulgation of the alleged order of the Interstate Commerce Commission, set forth in the petition herein, and for the enforcement of which alleged order this suit was instituted.

2. That the alleged or purported order of the Interstate Commerce Commission, set forth in the petition herein, and for the enforcement of which this suit was brought is unlawful and void and beyond the power of the Interstate Commerce Commission to make.

3. That the evidence in this case clearly and conclusively shows that all of the freight charges paid or caused to be paid by the petitioner on all and each and every of the shipments enumerated in the petition herein were voluntarily made by said petitioner or by its agent or agents for its account, with full knowledge on the part of said petitioner of the facts

and without the existence of any circumstances of duress of the person, duress of goods, mistake, fraud or extortion.

4. That the Interstate Commerce Commission had no jurisdiction over the defendant herein with respect to the shipments enumerated in the petition herein, or either or any of them, for the reason that with respect to the shipments and each and every of them the defendant herein was not engaged in interstate commerce within the meaning of the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and the various Acts of Congress amendatory thereof and supplemental thereto.

5. That upon the facts disclosed by the evidence the petitioner is estopped and concluded from denying the reasonable character of the freight rates paid by it upon the shipments involved in this case, or to demand or recover any sum whatever from the defendant, for the reason that the petitioner, with full knowledge of said rates and of the facts continued to voluntarily make said shipments for a long period of time extending over all or portions of the years 1902, 1903, 1904, 1905, 1906, and 1907, and to pay the freight thereon at the rates complained of with full knowledge on the part of said
petitioner of the facts and without the existence of any
505 circumstances of duress of the person, duress of the goods, mistake, fraud or extortion.

6. The evidence taken as a whole clearly and conclusively shows that the rates complained of by the petitioner in its petition herein were not excessive and unreasonable, and that upon the whole evidence in the case the petitioner is not entitled to recover.

Motion denied.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

The Court: I will hear both counsel on the question as to whether a verdict should be directed in favor of the plaintiff.

Mr. Phillips: I consider that, in the first place, this complaint does not set forth a cause of action; that the order is one beyond the power of the Commission to make; that the Commission cannot order a refund or reparation in a case of this kind without changing the rate for the benefit of the public. That also is included in our motion which the Court has just overruled, for a directed verdict.

The Court: I don't care to hear you on that proposition. I will hear you on whether or not there is any evidence at all

offered to meet the prima facie case made by the finding of the Interstate Commerce Commission.

Mr. Phillips: I don't think that I am prepared to argue that question at this moment. If the Court desires argument as to the amount of evidence necessary, as a matter of law, to rebut a prima facie case, I would ask for an adjournment until tomorrow morning to prepare myself on that point.

506 The Court: The inquiry now is as to whether any evidence has been offered at all to meet the prima facie case made by the finding of the Interstate Commerce Commission? This Act was passed only two years ago, I believe, as amended; but the act, in the sixteenth section as amended provides that in this kind of a suit, on the trial of such suit, the finding and order of the Commission shall be prima facie evidence of the facts therein stated. Of course the finding of the Commission could not be a final, binding judgment for the reason that the constitution gives to the party the right to trial by a jury. Congress has seen fit to make the finding of that Commission a prima facie case and thereby cast the burden of overcoming that prima facie case on the defendant; and this finding of the Commission is to the effect that thirty cents was a reasonable rate, and therefore fifteen cents per hundred pounds was demanded without right and was above a reasonable charge, and that is the amount which the Commission ordered returned. As I understand it, to determine whether or not a certain rate is a reasonable one, the inquiry is always whether or not the charges made by the carrier render to the carrier a reasonable and fair return on its investment. I take that to be the sole inquiry, and the case required to be made by the defendant is a showing of facts from which we may conclude that the rate charged only gave the carrier a reasonable and fair return on the investment. Now we haven't in this case any proof as to the amount invested in this property; nor any proof as to the total cost of operation. We have proof by one of the witnesses to the effect that the operating expenses were something like \$8,000,000., and he also—

Mr. Phillips: That was in wages alone.

The Court: Yes, but he doesn't tell us what the total of the operating expenses were, nor does he tell us the more
507 important fact as to what the total receipts of the company were, nor the total amount of money invested in the property. He does tell us that the preferred stock has never received over five per cent in dividends; the common stock has never received any dividends; but we are totally in the dark as to whether or not the company has each year laid

by a large surplus, or whether or not it had made a large net earning and reinvested that net earning in further improvements; and so, as I view the case, there isn't any evidence at all on which we can determine whether or not the rates it charged returned to it more than a fair and reasonable profit on the investment. In principle it impresses me, to use an illustration, like a case in which it is asserted that it is a thousand miles from Denver to St. Louis, and to meet that fact, or assertion, it is proven that it is seven hundred miles from Denver to Kansas City and there the party denying the distance from Denver to St. Louis stops; I don't consider that on such proof as that there is any substantial proof on which it could be found that a prima facie claim of one thousand miles to St. Louis has been overcome. I can't see possibly how, from all the evidence offered by the defendant, we can say whether the defendant has made any net earning at all, or ten, twenty or fifty per cent. In addition to showing the net earnings, and total expenditures, and the amount invested, I take it as a matter of common knowledge that all kinds of freight do not, and ought not, to bear the same rate of charges, and if we had the total investment in property, and the total receipts and the total expenses, and the net earnings, if any have been earned, that it would be further necessary for the defendant to show that in a proper adjustment of its charges it put no greater rate on beer than that sort of freight ought reasonably to bear. One character of freight necessarily ought to be charged a much higher rate than others; I don't know whether beer is one of the higher classed articles in 508 freight shipments or not. I believe Mr. Lampton testified it was put at one time in what was called the fifth class; I don't know whether that class demands a high rate charge or a low charge; but none of those facts are presented here. Now could I instruct this jury that accepting now as a prima facie case for the plaintiff, the findings made by the Interstate Commerce Commission, yet, nevertheless, if they find and believe from the evidence and all the facts in the case that the rate of forty-five cents on the hundred wasn't an unreasonable and excessive rate they must find in favor of the defendant? Now where are the data on which this jury can figure at all as to what would be a reasonable and fair rate on beer from Pueblo to Leadville? It doesn't solve anything to say it is a mountain road and that it is expensive to maintain; it may be that on all commodities of freight it charges, and has a right to charge, a higher rate per ton or one hundred pounds than other roads which operate in a prairie country; that they are compelled to charge a higher rate in order to have reasonable returns on the capital invested in building one hundred miles of road through that character of coun-

try than they would on a road running through a level country; but simply to say it is a mountain road, difficult to maintain, is only a part of the necessary basic facts that we must have in finally attempting to arrive at a reasonable and fair rate charge. It wouldn't avail us anything to know how much they received on dry goods or how much the total receipts on freight were. We must know the total receipts in freight and passenger service. We must know the total expenditure in maintenance and in repairs; we must know the total bonded indebtedness; we must know the total stock, common and preferred; then we must find out whether or not this defendant has been able, at the rates of charges fixed by the Commission, to earn a fair and reasonable return on the capital invested.

If it has not, and beer has not been made to bear more
509 than its fair and reasonable proportion in shipment than other commodities, then the verdict ought to be in favor of the defendant, because it is entitled to a fair and reasonable return on its investment. But until these facts are shown, as to whether or not the defendant receives a fair and reasonable return on its investment, I don't think the plaintiff's case has been met, or any evidence has been introduced that tends to meet it, and if the jury went out under this evidence and returned a verdict for the defendant I should feel that it was the duty of the Court to set it aside, because I am entirely unable to see that sufficient data, as a basis on which to make the calculation that is necessary in order to arrive at the ultimate purpose, to-wit, the inquiry as to whether or not these charges were reasonable or unreasonable, has been presented. Therefore I don't think a verdict in favor of the defendant could be received and permitted to stand, and in that condition of the case it is the duty of the Court not to submit it to the jury, because to do so would be simply to set it aside when it was returned. The defendant called attention to the provision in section 16 which says that all complaints to recover damages shall be filed with the Commission within two years from the time the cause of action accrues. It is true that the greater part of these shipments were more than two years before the complaint was made to the Interstate Commerce Commission, but it seems that they were continuous in a course of dealing, cars shipped almost every day, and I feel that it should be taken in the nature of a current account between parties. The cause of action does not accrue until the last item has been furnished. Enter judgment for the plaintiff as on the verdict of the jury, in the sum of \$3761.45 and costs, and the sum of \$500. will be taxed as fee for plaintiff's attorney, William B. Harrison, as a part of the costs.

510 To the entry of which judgment, and to the order for the taxing of the attorney's fee, the defendant, by its counsel, then and there separately and severally excepted.

And now, forasmuch as the above and foregoing matters and things do not appear fully of record, the defendant tenders, its bill of exceptions, consisting of Vol. I containing pages 1 to 279 and Vol. II, containing pages 279 to 435, by it reserved herein, and prays that the same may be signed and sealed by the judge of this Court, and made a part of the record in said cause, pursuant to the statute in such case made and provided; which is accordingly done on this 29th day of December, A. D. 1908.

ROBT. E. LEWIS,
District Judge.

Approved:

Wm. B. Harrison,
Attorney for Plaintiff.

Endorsed: No. 5180. United States Circuit Court district of Colorado. Baer Brothers Mercantile Company v. Denver & Rio Grande Railroad Company. Defendant's Bill of Exceptions Vol. II. Filed Dec. 29, 1908, Charles W. Bishop, Clerk.

511 United States of America
District of Colorado—ss.

In the Circuit Court of the United States for the District of
Colorado.

The Baer Brothers Mercantile Company, Petitioner,
No. 5810. vs.
The Denver and Rio Grande Railroad Company, Defendant.
Petition for Writ of Error.

Comes now The Denver and Rio Grande Railroad Company, defendant in the above entitled cause, by its attorneys, and complains:

That in the record and proceedings in said cause, and also in the rendering of the final judgment in said cause in favor of the petitioner, and against this defendant, by the said Circuit Court within and for the District of Colorado, on the law side thereof, which said final judgment was rendered on the 30th day of November, A. D. 1908, manifest error hath happened, to the great damage and injury of this defendant, The Denver and Rio Grande Railroad Company, in the rendition of the said judgment, which said errors are particularly assigned and set forth in the Assignment of Errors herewith filed.

Wherefore, the said defendant, The Denver and Rio Grande Railroad Company, prays for the allowance of a writ of error to operate as a supersedeas, and such other process as may cause the said judgment to be corrected by the Honorable United States Circuit Court of Appeals for the Eighth Judicial Circuit.

E. N. CLARK and T. L. PHILIPS,
Attorneys for the Defendant, The Denver and Rio Grande Railroad Company.

Endorsed: No. 5180. United States Circuit Court for District of Colorado. The Baer Bros. Mercantile Co., vs. The Denver and Rio Grande Railroad Company. Petition for Writ of Error. Filed Dec. 30, 1908. Charles W. Bishop, Clerk.

United States of America,
District of Colorado—ss.

In the Circuit Court of the United States for the District of Colorado.

The Baer Brothers Mercantile Company, Petitioner,
No. 5180. , vs.
The Denver and Rio Grande Railroad Company, Defendant.
Assignment of Errors.

Comes now The Denver and Rio Grande Railroad Company, defendant in the above entitled cause, by its attorneys, and shows:

That in the record and proceedings in said cause in said Circuit Court, there is manifest error in the following particulars, to-wit:

I.

The court erred in overruling defendant's motion to strike portions of the petition in said cause.

II.

The court erred in overruling the defendant's demurrer to the petition in said cause.

III.

The court erred in overruling the defendant's objection to the introduction of evidence by the petitioner in its petition in said cause.

IV.

The court erred in refusing to grant and sustain the defendant's motion requesting the court to direct the jury to re-

turn a verdict in favor of the defendant and against the petitioner, which motion was made at the close of the petitioner's evidence.

514

V.

The court erred in refusing to grant and sustain the defendant's motion requesting the court to direct the jury to return a verdict in favor of the defendant and against the petitioner, which motion was made after all of the evidence in the case was in.

VI.

The court erred in overruling the defendant's objection to the following question propounded to the witness Adolph Baer, by counsel for petitioner:

"Q. Do you know whether the Board of Directors of the two companies were the same?"

Said question having reference to the boards of directors of The Denver and Rio Grande Railroad Company and of The Rio Grande Western Railway Company during the period of time covered by the shipments involved in said cause.

VII.

The court erred in sustaining the petitioner's objection to the following question propounded to the witness S. M. Brown, and in sustaining the petitioner's motion to strike the answer of said witness to said question:

Q. I will ask you whether you, or The Denver and Rio Grande Railroad Company, at Leadville, ever made any threats to The Baer Brothers Mercantile Company, or to any of its officers, with regard to any action which would be taken against that company if it refused to pay the freight on these bills, or whether there were any threats made to take that company off the credit list if they did not pay this bill? A. No sir.

VIII.

The court erred in sustaining the objection of the petitioner to the following question propounded to the witness W. M. Lampton:

"Q. Do you know what the rate per hundred pounds between Pueblo and Leadville was on fifth class commodities, including beer, at the time the road was built in there?"

IX.

The court erred in sustaining the objection of the petitioner to the following question propounded to the witness W. M. Lampton:

Q. Do you know whether the fifth class rates at the time the road was opened into Leadville, and for sometime subsequent thereto, were higher or lower than the fifth class rate which was in effect at the time this commodity rate was put in on beer?

X.

The court erred in sustaining the objection of the petitioner to the following question propounded to the witness W. M. Lampton:

Q. I will ask you Mr. Lampton, whether or not during the period of time between the opening of the line of road of The Denver and Rio Grande Railroad Company between Pueblo and Leadville and the time when this commodity rate was put in on beer in 1898, as you have already testified, there
516 had been a general and continuous reduction in rates on fifth class commodities, including beer?

XI.

The court erred in sustaining the petitioner's objection to the following question propounded to the witness W. M. Lampton:

"Q. How do the freight rates on coal, lime rock, ore and bullion in and out of Leadville compare with rates on the same commodities in other places?"

XII.

The court erred in sustaining the petitioner's objection to the following question propounded to the witness W. M. Lampton, and in sustaining the petitioner's motion to strike the answer of said witness to said question; said question and answer being as follows:

*"Q. Can you state about what that decrease was?

A. I can speak so far as the Denver and Rio Grande road was concerned, probably about one-sixth."

XIII.

The court erred in refusing to permit the defendant to show by the witness Clyde Murdock the distance between various points upon the lines of railway of the Southern Pacific Company, and upon the railway of the El Paso and Southwestern

517 Railway, together with the rates of freight upon beer in
carload lots charged between such points, together with
the character of the railroad lines between such points,
and the character of country through which such lines of rail-
way run.

XIV.

The court erred in refusing to permit the defendant to show by the witness John J. Ivers the distance between various points upon what are commonly known as the Santa Fe lines of railway, together with the rates of freight upon beer in carload lots charged between such points, together with the character of the railroad lines between such points, and the character of the country through which such lines of railway run.

XV.

The court erred in refusing to permit the defendant to show by the witness R. A. Palmer the distance from Denver, Colorado, to Laramie, Wyoming, over the lines of railway of the Union Pacific Railroad Company, and the rate on beer in carload lots between said points, and in refusing to permit the defendant to show by the same witness the distance over the same railroad from Denver to Hanna, Wyoming, and the rate on beer in carload lots between said points.

XVI.

The court erred in sustaining the objection of the petitioner to the following question propounded to the witness George H. Kaub:

518 "Q. I will ask you to state, Mr. Kaub, whether in your
opinion a rate of forty five cents on beer in carload lots
between Pueblo, Colorado, and Leadville, Colorado, is a rea-
sonable rate?"

XVII.

The court erred in sustaining the petitioner's objection to the following question propounded to the witness George H. Kaub:

Q. I will ask you, Mr. Kaub, to state what would be the effect on the brewery interests of Denver of the establishment of a lower rate on beer from Pueblo, Colorado, to Leadville, Colorado, over the lines of The Denver and Rio Grande Railroad Company, than exists over the lines of the same company between Denver and Leadville?

XVIII.

The court erred in sustaining the objection of the petitioner to the following question propounded to the witness John W. Morey:

Q. Will you please state, Mr. Morey, what would be the effect on your business of the establishment of lower freight rates to Leadville and to the interior of Colorado on merchandise from Pueblo over the lines of The Denver and Rio Grande Railroad Company, than exist over the same line from Denver?

XIX.

The court erred in sustaining the petitioner's objection to the following question propounded to the witness John W. Morey:

Q. Please state, Mr. Morey, what in your opinion would
519 be the effect on the wholesale and manufacturing interests of the City of Denver of a reduction on merchandise rates from Pueblo to the interior points of Colorado, below the rate prevailing from Denver on the same commodities?

XX.

The court erred in refusing to permit the defendant to propound to the witness Chauncey Cowell the questions propounded to the witness John W. Morey, as set forth in Assignments or Error numbers XVIII and XIX.

XXI.

The court erred in sustaining the petitioner's objection to the defendant's offer in evidence of the following language from Section 1 of the Act of Congress commonly known as the "Elkins Act", as amended by Section 2 of the Act of Congress approved June 29, 1906, and commonly known as the "Hepburn Act".

The willful failure upon the part of any carrier subject to said Acts, to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.

XXII.

The court erred in sustaining the petitioner's objection to the defendant's offer in evidence of the following portion of
520 said Act of Congress approved June 29, 1906, being a portion of Section 16 of the Act of Congress approved Feb-

ruary 4, 1887, and commonly known as the Act to Regulate Commerce, as amended by said Act of June 29, 1906:

All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from date of the order, and not after: Provided, that claims accrued prior to the passage of this Act may be presented within one year.

XXIII.

The Court erred in ordering the entry of judgment in favor of the petitioner and against the defendant.

XXIV.

The court erred in refusing to submit the issues in this cause to the jury, and in directing the entry of judgment of its own motion in favor of the petitioner and against the defendant herein, thereby depriving the defendant of property without due process of law, in violation of Article 5 of the Articles in addition to, and amendment of, the Constitution of the United States of America.

XXV.

521 The court erred in ordering the taxing of a fee for the petitioner's attorney as a part of the costs in said cause.

XXVI.

The court erred in ordering and directing the taxing of the sum of five hundred dollars as fee for the petitioner's attorney as a part of the costs herein.

XXVII.

The court erred in rendering and entering any judgment whatsoever against the defendant and in favor of the petitioner.

Wherefore, the defendant, The Denver and Rio Grande Railroad Company, prays that the judgment aforesaid for the errors aforesaid, may be reversed, annulled and altogether holden for naught, and that the defendant, The Denver and Rio Grande Railroad Company may be restored to all things which it hath lost by reason of the judgment and proceedings aforesaid.

E. N. CLARK and
T. L. PHILIPS,

Attorneys for Defendant.

Endorsed: No. 5180, Circuit Court of United States, for District of Colorado. The Baer Bros. Mercantile Company, vs.

The Denver and Rio Grande Railroad Company. Assignment of Errors. Filed Dec. 30, 1908, Charles W. Bishop, Clerk.

522 The United States of America, District of Colorado.

Know All Men By These Presents, That we, The Denver and Rio Grande Railroad Company, as principal, and The United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety are held and firmly bound unto the Baer Brothers Mercantile Company in the full and just sum of Six Thousand (\$6000.00) Dollars, to be paid to the said The Baer Brothers Mercantile Company, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this thirtieth day of December in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at the November term, A. D. 1908, of the circuit court of the United States, for the district of Colorado, sitting at Denver, in a suit pending in said court between The Baer Brothers Mercantile Company, Petitioner, and The Denver and Rio Grande Railroad Company, Defendant, judgment was rendered against the said The Denver and Rio Grande Railroad Company and the said The Denver and Rio Grande Railroad Company having obtained a writ of error to the United States circuit court of appeals for the eighth circuit to reverse the judgment in the aforesaid suit; and a citation directed to the said

523 The Baer Brothers Mercantile Company citing and admonishing it to be and appear, in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said The Denver and Rio Grande Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above obli-

gation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

**THE DENVER & RIO GRANDE
RAILROAD COMPANY.**

(Corporate Seal
The D. & R. G.
Railroad Co.)

By C. H. Schlacks,
Its Vice President.

**THE UNITED STATES FIDELITY
& GUARANTY CO.**

(Corporate Seal
The U. S. Fidelity &
Guaranty Co.)

By David Jacobs
And Andrew W. Gillette
Attorney in Fact.

Attest J. B. Andrews
Assistant Secretary
Dec. 30th 1908

Approved ROBT. E. LEWIS
District Judge.

(Endorsed) No. 5180 United States Circuit Court, district of Colorado. The Baer Brothers Mercantile Company vs. The Denver and Rio Grande Railroad Company. Bond on Writ of Error. \$6000.00. Filed Dec 30, 1908. Charles W. Bishop, Clerk.

524 United States of America
District of Colorado—ss.

In the Circuit Court of the United States for the
District of Colorado.

The Baer Brothers Mercantile Company, Petitioner,
No. 5180 vs.

The Denver and Rio Grande Railroad Company, Defendant.

Præcipe for Transcript.

To the Clerk of the above entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Judicial Circuit, under the Writ of Error heretofore granted to said Court, and including in said transcript the following pleadings, proceedings and papers on file, to-wit:

Complaint;
Motion to Strike Portions of the Complaint;
Ruling on Motion to Strike;
Demurrer;

Special Bill of Exceptions, showing overruling of said Demurrer and defendant's exception thereto;

Answer;

Replication;

Order for Trial;

525 Motion for Directed Verdict filed at the close of petitioner's case, and ruling on said Motion;

Motion for Directed Verdict filed by defendant at the conclusion of all the evidence, and ruling on said Motion;

Court's Order directing judgment in favor of petitioner as on verdict;

Judgment;

Bill of Exceptions;

Application for Writ of Error;

Assignment of Errors;

Bond on Error;

Writ of Error; and

Citation.

E. N. CLARK

and T. L. PHILIPS

Attorneys for the Defendant, The Denver and Rio Grande Railroad Company.

(Endorsed) No. 5180, U. S. Circuit Court District of Colorado. The Baer Brothers Mercantile Company, vs. The Denver and Rio Grande Railroad Company. Preceipe for Transcript. Filed Dec. 30, 1908. Charles W. Bishop, Clerk.

526 Writ of Error, to United States Circuit Court of

Appeals, Eighth Circuit.

The United States of America.

United States of America,

District of Colorado—ss.

The President of the United States of America:

To the Honorable, the Judges of the United States Circuit Court, for the District of Colorado—Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you at the November term, 1908, thereof, between The Baer Brothers Mercantile Company, petitioner, and The Denver and Rio Grande Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The Denver and Rio Grande Railroad Company, as by its Complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties

aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 27th day of February 1909 to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of December, in the year of our Lord, one thousand nine hundred and eight, and of the Independence of the United States the 133d year.

Issued, at the office in the City and County of Denver, in said District, with the Seal of the United States Circuit Court, for the District of Colorado, and dated as aforesaid.

Seal
U. S. Circuit Court.
Dist. of Colorado.

CHARLES W. BISHOP,
Clerk U. S. Circuit Court, Dist. of Colorado.

Dec. 30th, 1908.

Allowed by Robt. E. Lewis, District Judge.

Return.

The United States of America,
District of Colorado—ss.

In obedience to the command of the within Writ, I herewith transmit to the Honorable, The United States Circuit Court of Appeals a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I herewith subscribe my name, and affix the seal of said United States Circuit Court, for the District of Colorado, at the City and County of Denver, in said District, this 22nd day of January, 1909.

Seal
U. S. Circuit Court.
Dist. of Colorado.

CHARLES W. BISHOP, Clerk.

District of Colorado—ss.

The plaintiff in error, having served this writ, by lodging a copy thereof in the Clerk's office where the record remains, and having given the security required by law, on the issuing of the citation, within the time required by law, this writ therefore becomes a supersedeas.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said United States Circuit Court, for the District of Colorado, at the City and County of Denver, in said District, this 30th day of December, A. 1908.

Seal
U. S. Circuit Court.
Dist. of Colorado.

CHARLES W. BISHOP, Clerk.

No. 5180. United States Circuit Court of Appeals, Eighth Circuit. The Denver and Rio Grande Railroad Co., Plaintiff in Error, vs. The Baer Brothers Mercantile Co., Defendant in Error. Writ of Error to U. S. Circuit Court, District of Colorado. Filed Dec. 30, 1908, Charles W. Bishop, Clerk. E. N. Clark and T. L. Philips Attorneys for Plaintiff in Error.

527 Citation on Writ of Error.—U. S. Circuit Court of Appeals.

United States of America,
Eighth Judicial Circuit—ss.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America: To The Baer Brothers Mercantile Company—Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, sitting at Denver, wherein The Denver and Rio Grande Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the circuit court of the United States for the district of Colorado, this 30th day of December, A. D. 1908.

ROBT. E. LEWIS, Judge.

Proof of Service.

I do hereby acknowledge service of the within citation this 30th day of December, 1908.

WM. B. HARRISON,
Attorney for Defendant in Error.

No. 5180. United States Circuit Court of Appeals, Eighth Circuit. The Denver and Rio Grande Railroad Co., Plaintiff in Error, vs. The Baer Brothers Mercantile Co., Defendant in Error. Citation. Filed Dec. 30, 1908. Charles W. Bishop, Clerk.

528 United States of America,
District of Colorado—ss.

I, Charles W. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages bound in two (2) volumes and numbered from one (1) to three hundred and nine (309) and from three hundred and ten (310) to five hundred and twenty five (525), all numbers inclusive, to be a true, perfect and complete transcript and copy of the pleadings and other matters set forth in the praecipe filed herein, together with a true copy of such praecipe, heretofore filed or entered of record in said court and in a certain case lately in said court pending wherein The Baer Brothers Mercantile Company was plaintiff and The Denver and Rio Grande Railroad Company was defendant, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto
sign my name and affix the seal
of said court, at the City and
County of Denver, in said district,
this twenty-second day of January,
A. D. 1909.

Seal
U. S. Circuit Court.
District of Colorado.

CHARLES W. BISHOP, Clerk.

Filed Jan. 28, 1909. John D. Jordan, Clerk.

(Appearance of Counsel for Plaintiff in Error.)

On the first day of February, A. D. 1909, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2997.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,
vs.

THE BAER BROTHERS MERCANTILE COMPANY.

The Clerk will enter our appearance as Counsel for the Plaintiff in Error.

E. N. CLARK AND
T. L. PHILIPS,

407 Equitable Building, Denver, Colo.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2997. The Denver & Rio Grande Railroad Company, Plaintiff in Error, vs. The Baer Brothers Mercantile Company. Appearance. Filed Feb. 1, 1909. John D. Jordan, Clerk. E. N. Clark, T. L. Philips, Counsel for Pl'tf in Error.

(Appearance of Counsel for Defendant in Error.)

And on the tenth day of February, A. D. 1909, the appearance of counsel for defendant in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2997.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,
vs.

THE BAER BROTHERS MERCANTILE COMPANY.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

WM. B. HARRISON,
Room 421 Quincy Building, Denver, Colo.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2997. The Denver and Rio Grande Railroad Company, Plaintiff in Error, vs. The Baer Brothers Mercantile Company. Appearance. Filed Feb. 10, 1909. John D. Jordan, Clerk. William B. Harrison, Counsel for Def't in Error.

(Order of Argument.)

And on the eighteenth day of September, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of argument in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1909, Saturday, September 18, 1909.

No. 2997.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,
vs.
THE BAER BROTHERS MERCANTILE CO.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause having been called for hearing by the Court, argument was commenced by Mr. T. L. Phillips for plaintiff in error, and the hour for adjournment having arrived further argument was postponed until Monday morning, September 20, 1909.

(Order of Submission.)

And on the twentieth day of September, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1909, Monday, September 20, 1909.

No. 2997.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,
vs.
THE BAER BROTHERS MERCANTILE COMPANY.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause having been called for further hearing, argument was concluded by Mr. William B. Harrison for defendant in error.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the eighteenth day of May, A. D. 1911, an opinion of said United States Circuit Court of Appeals for the Eighth Circuit, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term,
A. D. 1911.

No. 2997.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,
vs.
THE BAER BROTHERS MERCANTILE COMPANY, Defendant in Error.
In Error to the Circuit Court of the United States for the District
of Colorado.

Mr. T. L. Philips (Mr. E. N. Clark and Mr. J. F. Vaile, were with him on the brief) for plaintiff in error.

Mr. William B. Harrison appeared for defendant in error.

Before Sanborn and Van Devanter, Circuit Judges, and William H. Munger, District Judge.

Syllabus.

1. Interstate Commerce Commission—Reparation—Order for—Establishment of Maximum Rate Condition Precedent.

In a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully established rate had been excessive because that rate was unreasonable the finding and prescription by the Commission of a reasonable maximum rate to be observed in the future and an order by the Commission forbidding the use of a rate in excess thereof are conditions precedent to its exercise of its power to order reparation.

SANBORN, *Circuit Judge*, delivered the opinion of the court.

It is 923 miles from St. Louis, Missouri, to Pueblo, Colorado, and the Missouri Pacific Railway Company operates a railroad between those towns. It is 160 miles from Pueblo to Leadville, Colorado, and the Denver & Rio Grande Railroad Company operates a railroad between those cities. Between July 11, 1902, and March 17, 1907, these companies carried thousands of pounds of beer from William J. Lemp Brewing Company at St. Louis to Leadville in Colorado, for Baer Brothers Mercantile Company, a corporation, at the lawfully established rates. The Act of 1906 to amend the Act

of 1887 to regulate commerce, was approved on June 29, 1906, 34 Stat. 3591, pages 584, 595. On May 6, 1907, the Baer Company filed its complaint with the Interstate Commerce Commission against these railroad companies wherein it alleged that between July 11, 1902, and March 17, 1907, they collected from it \$7,299.27 more than they would have collected if they had charged only reasonable rates for the transportation of the beer, and it prayed (1) that the Commission would order the companies to cease from collecting such unreasonable rates, (2) that it would make an order fixing a reasonable rate for the through transportation of the beer in carload lots from St. Louis to Leadville, and (3) that it would order the railroad companies to pay to it \$7,299.27 as a reparation for the damages sustained by it in consequence of their unreasonable exactions. On April 6, 1908, after a full hearing on this complaint, the Commission filed its report to the effect, among other things, that the beer moved on the local way-bills of the two companies at the published rate of the Missouri Pacific Company from St. Louis, Missouri, to Pueblo, which was sometimes 45 cents and sometimes 50 cents per cwt. and was a reasonable rate, and at the local rate of the Denver & Rio Grande Company from Pueblo to Leadville, which was 45 cents per cwt. and was 15 cents in excess of a reasonable rate, and it ordered the Rio Grande Company to pay to the Baer Company \$3,438.27, but it did not prescribe what should be the reasonable rate to be thereafter observed as the maximum rate to be charged for this transportation service, nor did it prohibit the Rio Grande Company from continuing to charge and collect the rate of 45 cents per cwt. which had been in force during all the transportation in question. Upon this order for the repayment of the \$3,438.27 the Baer Company brought this action against the Denver & Rio Grande Company alone and at the close of the trial the court directed a verdict and rendered a judgment against that Company. This judgment is assailed on the grounds (1) that the transportation by the Denver & Rio Grande Company from Pueblo to Leadville was wholly within a single state, was not under any through joint rate, and was of property not shipped to or from a foreign country from or to any state or territory so that it was beyond the control, and the claim for reparation was without the jurisdiction of the Interstate Commerce Commission, 34 Stat. Chap. 3591, Sec. 1, page 584; (2) that the order for reparation was unauthorized and without the jurisdiction of the Interstate Commerce Commission because it was not founded upon or accompanied by any order establishing a maximum rate to be charged and requiring conformity thereto, 34 Stat. Chap. 3591, Sec. 4, amending Sec. 15, page 589; (3) that the payments for which the Baer Company seeks reparation were voluntary, and (4) that in the trial of the case competent and material evidence was excluded.

These facts were conclusively established at the trial: There never was any joint through rate for the transportation of beer from St. Louis to Leadville over the Missouri Pacific Railway and the Denver & Rio Grande Railroad and there never was any conventional or other division of any joint through rate for such trans-

portation between the companies owning these railroads. Each company maintained during all the transportation in question its lawfully established and independent local rate over its own railroad and the beer moved at the sum of these local rates. Each shipment was accompanied with an order delivered to the Missouri Pacific Railway Company by the Lemp Brewing Company at St. Louis to send the beer to the Baer Company at Leadville via the Denver & Rio Grande Railroad Company, and the Missouri Pacific Company gave a receipt which described each shipment and acknowledged its receipt "in good order from Wm. J. Lemp Brewing Company, by Missouri Pacific Railroad Co. to be delivered to The Baer Bro. Mercantile Co. at Leadville, Colo. via D. & R. G." No bill-of-lading was ever issued. Each shipment was way-billed to Pueblo at the Missouri Pacific local rate because that Company had no through rate or billing arrangements thereon at Pueblo. Each shipment was delivered by the Missouri Pacific Company to the Denver & Rio Grande Railroad Company with a transfer sheet or expense bill which described the shipment and disclosed the freight charges of the Missouri Pacific Company or contained the statement that they were paid, the origin and destination of the shipment, the consignor and the consignee. The Denver & Rio Grande Company received the shipment at Pueblo and billed it from that city to Leadville over its railroad at its local rate of 45 cents per cwt., naming therein the Missouri Pacific Company as the consignor and the Baer Company as the consignee. The transfer sheet and the way-bill conveyed the same information that would have been conveyed had the shipment been made by any other party at Pueblo from that city to Leadville. The local rate of 45 cents per cwt. in carload lots from Pueblo to Leadville was in force from 1898 until after 1907, and in that year, after the Interstate Commerce Commission had requested that all local rates should be filed, the Denver & Rio Grande Company filed that rate with the Commission. When the first shipment of the beer was delivered to the Denver & Rio Grande at Pueblo it paid the Missouri Pacific its charges thereon at its published rate and after its arrival at Leadville and after the Baer Company had received and unloaded it the Baer Company paid the sum of the charges of both companies to the Denver & Rio Grande Company and protested that those charges were excessive. The Lemp Company paid the charges of both railroad companies to the Missouri Pacific on all the subsequent shipments of the beer throughout the five years some days after the shipments were respectively made, wrote across the bills it paid the words, "paid under protest," and the Missouri Pacific Company paid to the Denver & Rio Grande Company the latter's charges upon these shipments at its local rate of 45 cents per cwt. for carload lots.

Upon this state of facts counsel for the Denver & Rio Grande Company insist that the reasonableness of the rate of that Company upon beer from Pueblo to Leadville was not within the jurisdiction of the Interstate Commerce Commission because the transportation the railroad company conducted was wholly within the State of Colorado on independent contracts made by itself to carry

this beer on its railroad at its local rate, because there never was any through joint rate for its transportation from St. Louis to Leadville, or any conventional or other division of such a rate between the railroad companies, or any through bill-of-lading, because the Missouri Pacific Company never contracted and never had any authority from the Denver & Rio Grande Company to contract to transport beer from Pueblo to Leadville over the railroad of the latter and the only contract of the Missouri Pacific Company was to carry it from St. Louis to Pueblo over its railroad at its local rate and to deliver it to the Denver & Rio Grande Company at that place, and the Missouri Pacific Company was a forwarder at Pueblo and not a contractor for the transportation of the beer over the railroad of the Denver & Rio Grande Company. This contention is not without great persuasive force, *Gulf, Colorado & Santa Fe R. R. Co. v. Texas*, 204 U. S. 403, 412, 413, 414; *Interstate Commerce Comm. v. Bellaire Z. & C. Ry. Co.*, 77 Fed. 942, 943; *United States v. Chicago, K. & S. R. Co.*, 81 Fed. 783; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 630; *United States v. Colorado & N. W. R. R. Co.*, 85 C. C. A. 27, 34-37, 157 Fed. 321, 328-31, but it is unnecessary to a disposition of this case to determine the question it presents and without intimation that the contention is either sound or unsound the question is passed without decision.

Conceding then, but neither deciding nor admitting, that the reasonableness of the rate of the Denver & Rio Grande Railroad Company on beer in carload lots from Pueblo to Leadville and the Baer Company's claim for reparation on account of its alleged unreasonableness were within the jurisdiction of the Interstate Commerce Commission, had that Commission authority to order such reparation without prescribing what would be a reasonable maximum rate to be observed in the future and making an order that the carrier should not thereafter demand or collect any rate in excess of the maximum rate so prescribed?

The chief purpose of the act to regulate commerce and its amendments was to prevent unjust preferences and undue discriminations and to secure uniformity of rates and service. *Interstate Commerce Comm. v. Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 167 U. S. 479, 494; *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 439. The rate which the Denver & Rio Grande Company charged and collected was a lawfully established rate. It had been in force for more than eight years when the complaint before the Commission was filed. If, as that Commission found, it was unreasonable no one could determine how unreasonable it was until that body determined what a reasonable maximum rate would be and prohibited a rate in excess thereof. There was not, is not, and never will be any standard by which the reasonableness of the rate may be measured until such an order is made. Witness the claim of the Baer Company that the amount collected by the Denver & Rio Grande Company was \$7,299.27 more than would have been collected at a reasonable rate, the denial of the Railroad Company that it was in excess of the amount collectible at the reasonable rate and the finding of the Commission that it was

\$3,438.27 in excess of such an amount. In the light of these facts it is obvious that in the absence of the establishment of a standard of reasonableness by an order of the Commission an undue preference and an unjust discrimination is likely to arise from every such order of reparation and the main object of the Interstate Commerce law is likely to be defeated thereby. Other shippers have been and all shippers continue to be required to pay the railroad company's established rate of 45 cents per cwt. under the penalties denounced by Section 1 of the Interstate Commerce act as amended for receiving any rebate or concession from that rate, 34 Stat. 587, 588, and their only chance of relief is an order of reparation like that granted to the Baer Company for some indeterminate amount.

It was in view of these circumstances that the Supreme Court decided in 1907 in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 448, that a shipper seeking reparation on account of the unreasonableness of a rate could maintain no action in the state courts therefor until the Interstate Commerce Commission had prescribed a reasonable maximum rate for the future and had prohibited the use of a rate in excess thereof and had thereby fixed a uniform standard of reasonableness. The argument was made in that case that the same danger of preferences and discriminations would result in such cases from orders of reparation by the Commission as from judgments of reparation by the courts and the answer was that when the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new rate applicable to all; that the difference between the two cases is that a judgment of reparation by a court which could not, and hence would not, establish a new rate applicable to all, would destroy the uniformity of rates which it was the object of the statute to secure while an order of reparation by the Commission accompanied by and founded upon an order establishing a new maximum rate applicable to all would enforce the equality and uniformity which the statute commands. 204 U. S. 406. By the same mark an order of reparation made by the Commission in such a case which is not accompanied by and based upon an order establishing a new rate applicable to all destroys the uniformity of rates which it was the object of the statute to secure and is unauthorized and void.

The proceeding before the Commission in this case was instituted by a complaint filed with that body by the Baer Company and a full hearing was had thereon as provided in Section 13 of the Interstate Commerce Act. That act provides by Section 15, as amended, 34 Stat. 589, that in such a case it shall be the duty of the Commission whenever it is of the opinion that any rates charged are unjust or unreasonable "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged." * * * and "to make an order that the carrier

shall cease and desist from such violation, to the extent to which the Commission find the same to exist and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed." The following section of the act as amended then provides that if, after such a hearing, the Commission shall determine that any complainant is entitled to an award of damages for a violation of the act it may make an order directing the carrier to pay the amount thereof. The original act of 1887 did not impose the duty upon the Commission upon a complaint for reparation on account of the unreasonableness of an established rate to determine what should be the reasonable maximum rate to be observed in the future and to make an order prohibiting the use of a higher rate, and the Commission held under that state of the law that an order prescribing a future rate was in no way connected with an order for reparation and that the right to make one was not necessarily conclusive of the right to make the other. *Cattle Raisers' Ass'n v. C. B. & Q. R. Co.*, 10 I. C. C. 83, 90. Congress and the Supreme Court seem to have perceived the vice and injustice of that state of the law, the undue preferences and unjust discriminations for which it gave opportunity and to which it gave unavoidable effect and the gross injustice to which it subjected carriers who were required under drastic penalties to collect the established rates subject to a liability to repay to such of the shippers as might complain such indeterminate amounts as the Commission might deem the amounts collected under the varying proofs in the various cases to be in excess of those which would have been collected in each case under what the Commission might deem after the event to have been a reasonable rate. That condition of the law was intolerable and the Congress so amended it in 1907 as to impose upon the Commission the imperative duty in each case of this character, where after hearing it is of the opinion that a rate was unreasonable, to prescribe a reasonable maximum rate applicable to all and to order the carrier to desist from the use of a rate in excess thereof. After this amendment the Interstate Commerce Commission said in *A. J. Poor Grain Co. v. C. B. & Q. Ry. Co.*, 12 I. C. C. 418, 423, "Nor may this Commission authorize a carrier to make a refund from the charges collected on the basis of the published rate, or otherwise to depart from the published rate, unless, upon a hearing or upon an admission of the carrier, the Commission finds that rate to be discriminatory or unreasonable in amount and orders the establishment of a different rate." And in *Pueblo Transportation Ass'n v. Southern Pacific Company*, 14 I. C. C. 82, 84, the Commission said: "The act to regulate commerce authorizes this Commission to condemn an unreasonable rate, to prescribe a rate to be applied in lieu thereof, and to award damages under the rate so condemned; but in all proceedings before the Commission, both formal and informal, the essential prerequisite to any award of damages is the condemnation of a rate, rule, or practice as unreasonable and the establishment in lawful tariff publication of the rate, rule, or practice that is made the basis of such award."

The facts that this prerequisite is indispensable to equality and

uniformity in the administration of this law and that orders of the Commission not accompanied by and based upon its present patent opportunities for and inevitably effect preferences and discriminations which it was the object of the statute to prevent, the express terms and evident purpose of the amendments of 1906, which have been recited, the opinion of the Supreme Court in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 448, and the decisions of the Interstate Commerce Commission which have been cited, converge to convince that in a case of the character of that in hand the establishment by order of the Commission of a maximum reasonable rate applicable to all and by which all future exactions shall be judged is a condition precedent to the exercise by the Commission of the power to order reparation. And the conclusion is that in a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully established rate has been excessive because that rate was unreasonable, the finding and prescription by the Commission of a reasonable maximum rate to be observed by all, and an order by the Commission prohibiting the use of a rate in excess thereof, are conditions precedent to the exercise of its power to order reparation. An order of reparation without such an establishment of a reasonable maximum rate is beyond the power of the Commission and void, and as no such rate was prescribed and no order forbidding the future use of an excessive rate was made in the case in hand the Commission's order of reparation in this case was beyond its power and void.

This conclusion disposes of the case in hand and renders it impossible for a judgment to be obtained against the Railroad Company upon the reparation order of the Commission upon which the action is based. It is, therefore, unnecessary to consider the other questions in the case and the judgment below is reversed.

Filed May 18, 1911.

(Judgment.)

And on the eighteenth day of May, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1911.

No. 2997.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,

vs.

THE BAER BROTHERS MERCANTILE COMPANY.

In Error to the Circuit Court of the United States for the District of Colorado.

THURSDAY, May 18, 1911.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Colorado, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby reversed with costs; and that The Denver and Rio Grande Railroad Company have and recover against The Baer Brothers Mercantile Company the sum of ——— Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions for further proceedings in accordance with the views expressed in the opinion of this Court.

May 18, 1911.

(Petition of Defendant in Error for a Rehearing.)

And on the eleventh day of July, A. D. 1911, a petition of the defendant in error for a rehearing was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 2997.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,

vs.

THE BAER BROTHERS MERCANTILE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

Petition for Rehearing.

Now comes the defendant in error above named, and respectfully petitions the court to recall and set aside the opinion heretofore

rendered herein, and to grant a rehearing of this cause; and for grounds of such petition respectfully urges that this Honorable Court has inadvertently committed error to the manifest and great prejudice of the petitioner, and in the following respects, to-wit:

1. In holding that a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully established rate has been excessive, because that rate was unreasonable, the finding and prescription by the Commission of a reasonable maximum rate to be observed by all, and an order by the Commission prohibiting the use of a rate in excess thereof, are conditions precedent to the exercise of its power to order reparation; and in holding that an order of reparation without such an establishment of a reasonable maximum rate is beyond the power of the Commission and void; and in holding that, as no such rate and no order forbidding the future use of an excessive rate were made in the case at bar, the Commission's order of reparation in this case was beyond its power and void.

2. In holding that the local rate of the Denver & Rio Grande Company of forty-five cents per hundred pounds on beer in carload lots from Pueblo to Leadville was a rate lawfully established in compliance with the Act to Regulate Commerce, as the rate applied to the through transportation of beer in carload lots from St. Louis to Leadville; and in holding that the Commission had exclusive jurisdiction to alter said rate.

3. In entering judgment herein against the defendant in error for the costs incurred by the plaintiff in error in this case.

4. In reversing the judgment of the court below for the reasons stated in the opinion, or for any reason properly or at all presented by the record before the court; and in remanding this case to the Circuit Court with directions for further proceedings in accordance with the views expressed in the opinion of the court.

For the several reasons heretofore assigned, your petitioner respectfully urges that this Honorable Court has committed error to the great prejudice and damage of your petitioner; and your petitioner therefore asks that a rehearing of this cause be granted, to the end that said errors may be corrected.

Respectfully submitted,

WM. B. HARRISON,
Attorney for Defendant in Error.

Certificate of Counsel.

I, William B. Harrison, counsel for defendant in error, petitioner herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

Denver, Colorado, July 7, 1911.

WM. B. HARRISON.

(Endorsed:) Filed Jul- 11, 1911. John D. Jordan, Clerk.

(Order Denying Petition for a Rehearing and Modifying Judgment as to Costs in This Court.)

And on the ninth day of October, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a rehearing and modifying the Judgment as to costs in this Court in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1911, Monday, October 9, 1911.

No. 2997.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,

vs.

THE BAER BROTHERS MERCANTILE COMPANY.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Defendant in Error.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

It is further ordered and adjudged that the judgment entered by this Court in the above cause on the 18th day of May, A. D. 1911, be, and the same is hereby, modified so that the reversal of the judgment below shall be without costs to either party in this Court.

October 9, 1911.

(Petition for Writ of Error from Supreme Court, U. S.)

And on the seventeenth day of November, A. D. 1911, a petition for writ of error from the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,

vs.

THE BAER BROTHERS MERCANTILE COMPANY, Defendant in Error.

Petition for Writ of Error.

Your Petitioner, the Baer Brothers Mercantile Company, defendant in error in the above entitled cause, respectfully shows that the

above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, that a judgment has therein been rendered on the 18th day of May, A. D. 1911, reversing a judgment of the Circuit Court of the United States for the District of Colorado; that the matter in controversy in said suit exceeds one thousand dollars (\$1,000) besides costs, and that the jurisdiction of none of the Courts above mentioned is, or was, dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of the different states; that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws; that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; therefore, your Petitioner would respectfully pray that a writ of error be allowed Petitioner in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herewith filed by said defendant in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE BAER BROTHERS MERCANTILE
COMPANY,

By WILLIAM L. DAYTON, *Its Attorney.*

The foregoing Petition is granted, and writ of error allowed as prayed for upon plaintiff's giving bond according to law, in the sum of \$500.00.

November 9th, 1911.

WILLIS VAN DEVANTER,

*Associate Justice of the Supreme Court
of the United States.*

(Endorsed:) No. 2997. In the United States Circuit Court of Appeals for the Eighth Circuit. The Denver & Rio Grande Railroad Company, Plaintiff in Error, vs. The Baer Brothers Mercantile Company, Defendant in Error. Petition for Writ of Error from Supreme Court, U. S. Filed Nov. 17, 1911, John D. Jordan, Clerk. William L. Dayton, Att'y for Petitioner.

(Assignment of Errors on Writ of Error from Supreme Court, U. S.)

And on the seventeenth day of November, A. D. 1911, an assignment of errors on writ of error from the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

The United States Circuit Court of Appeals for the Eighth Circuit.

THE DENVER & RIO GRANDE RAILROAD COMPANY, Plaintiff in Error,

vs.

THE BAER BROTHERS MERCANTILE COMPANY, Defendant in Error.

Assignment of Errors.

And now comes the defendant in error, The Baer Brothers Mercantile Company, by William L. Dayton, its attorney, and says that in the record and proceedings aforesaid of the said United States Circuit Court of Appeals for the Eighth Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said defendant in error in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment reversing the judgment of the Circuit Court of the United States for the District of Colorado for three thousand seven hundred and sixty-one dollars and forty-five cents and costs of suit, entered on the thirteenth day of November, A. D. 1908, in favor of said defendant in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not affirming the said judgment of the United States Circuit Court aforesaid.

Third. Said Circuit Court of Appeals erred in holding "that in a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully established rate has been excessive because that rate was unreasonable, the finding and prescription by the Commission of a reasonable maximum rate to be observed by all, and an order by the Commission prohibiting the use of a rate in excess thereof, are conditions precedent to the exercise of its power to order reparation."

Fourth. Said Circuit Court of Appeals erred in holding that in a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully established rate has been excessive because that rate was unreasonable, the finding and prescription by the Commission of a reasonable maximum rate to be observed by all, and an order by the Commission prohibiting the use of a rate in excess thereof, are conditions precedent to the exercise of its power to order reparation, and that an order of reparation without such an establishment of a reasonable maximum rate is beyond the power of the commission, and void.

Fifth. Said Circuit Court of Appeals erred in holding that because no previous or contemporaneous order was made by the Interstate Commerce Commission prescribing the maximum rate to be observed in future by the said The Denver & Rio Grande Railroad Company, plaintiff in error, and prohibiting the use of a rate in excess thereof in the case in hand, the Commission's order of reparation in this case was beyond its power and void.

Sixth. Said Circuit Court of Appeals erred in holding that because no previous or contemporaneous order was made by the Interstate Commerce Commission prescribing the maximum rate to be observed in future by the said The Denver & Rio Grande Railroad Company, plaintiff in error, and prohibiting the use of a rate in excess thereof in the case in hand, it was impossible for a judgment to be obtained against the said Railroad Company upon the order of the Commission upon which the action in this case is based.

Seventh. Said Circuit Court of Appeals erred in holding that the order of reparation herein was void.

Eighth. Said Circuit Court of Appeals erred in holding that the judgment herein of the Circuit Court was void.

Ninth. Said Circuit Court of Appeals erred in holding that "the rate which The Denver & Rio Grande Railroad Company charged and collected was a lawfully established rate."

Tenth. Said Circuit Court of Appeals erred in holding that the rate which The Denver & Rio Grande Railroad Company charged and collected had been filed with the Interstate Commerce Commission and published as an interstate rate, or as any part of an interstate rate.

Eleventh. Said Circuit Court of Appeals erred in holding that the act to regulate Commerce was so amended by Congress in 1906 as to impose upon the Commission the imperative duty in a case of this character to prescribe a reasonable maximum rate applicable to all, and to order the carrier to cease and desist from the use of a rate in excess thereof.

Twelfth. Said Circuit Court of Appeals erred in remanding this case to the Circuit Court with directions for further proceedings in accordance with the views expressed in the opinion of said Circuit Court of Appeals.

Thirteenth. Defendant in error says that if the order of reparation and the judgment thereon of the Circuit Court were void because the Interstate Commerce Commission failed to make a previous or contemporaneous order prescribing a maximum rate for the future, and prohibiting any departure therefrom, the case should have been remanded to the Interstate Commerce Commission with directions to make such order, and to post-date said order of reparation in accordance with the opinion of the Court.

Fourteenth. Said Circuit Court of Appeals erred in denying the petition for rehearing, and in refusing to consider the fact that subsequent to making the order of reparation herein the Interstate Commerce Commission, on complaint of defendant in error, made an order fixing a maximum rate of 30 cents per hundred pounds on beer in carload lots from Pueblo, Colorado, to Leadville, Colorado, when part of a through transportation from St. Louis, Missouri, to said Leadville, and prohibiting the said Denver and Rio Grande Railroad Company from charging a rate in excess of said maximum rate.

Fifteenth. Said Circuit Court of Appeals erred in holding that the contention of plaintiff in error The Denver & Rio Grande Railroad Company, that the transportation by it of the beer in question from

Pueblo to Leadville was not subject to the act to regulate Commerce, nor to the jurisdiction of the Commission "was not without great persuasive force," and in refusing to determine this and other questions in the case.

Sixteenth. Defendant in error further says that Section 15 of the act to regulate Commerce as construed by said Circuit Court of Appeals aforesaid, is repugnant to and in conflict with Article 5 of the Constitution of the United States, which declares that no person shall be deprived of property without due process of law.

Seventeenth. Defendant in error further says that under the act to regulate Commerce as amended in 1906, the Circuit Court of Appeals was without jurisdiction to review the lawfulness of the said order of reparation.

Eighteenth. Defendant in error further says that the plaintiff in error, by failure to make application to the Interstate Commerce Commission for a rehearing, waived its right to object in this case that the order of reparation was invalid because the future rate was not prescribed as aforesaid.

Wherefore, The said The Baer Brothers Mercantile Company, defendant in error, prays that for the errors aforesaid, and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the defendant in error, the said judgment of the said United States Circuit Court of Appeals be reversed and for naught held, and that the judgment of the United States Circuit court for the District of Colorado be affirmed, or for such further proceedings in said cause as may be determined upon by this honorable Court to the end that justice may be done in the premises.

WILLIAM L. DAYTON,
Attorney for Defendant in Error.

Of Counsel.

(Endorsed:) No. 2997. In the United States Circuit Court of Appeals for the Eighth Circuit. The Denver & Rio Grande Railroad Company, Plaintiff in Error, vs. The Baer Brothers Mercantile Company, Defendant in Error. Assignment of Errors on Writ of Error from Supreme Court, U. S. Filed Nov. 17, 1911, John D. Jordan, Clerk. William L. Dayton, Att'y for Def't in Error.

(Bond on Writ of Error from Supreme Court, U. S.)

And on the seventeenth day of November, A. D. 1911, a bond on writ of error from the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Know All Men By These Presents: That we, The Baer Brothers Mercantile Company, as Principal, and Fidelity and Deposit Co. of

Maryland, as Surety, are held and firmly bound unto The Denver and Rio Grande Railroad Company, in the full and just sum of Five hundred dollar*d* (\$500.) to be paid to the said The Denver and Rio Grande Railroad Company, its certain attorneys, successors or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 31st day of October in the year of our Lord one thousand nine hundred and eleven.

Whereas, late at the Circuit Court of Appeals for the Eight- Circuit in a suit depending in said court between The Denver and Rio Grande Railroad Company, plaintiff, and The Baer Brothers Mercantile Company, defendant, a judgment was rendered against the said The Baer Brothers Mercantile Company, and the said The Baer Brothers Mercantile Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Denver and Rio Grande Railroad Company, citing and admonishing it to be and appear at a session of the Supreme Court of the United States within thirty days from the date of said citation:

Now the condition of the above obligation is such that if the said The Baer Brothers Mercantile Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.]

THE BAER BROTHERS MERCANTILE
COMPANY,

By ADOLF BAER, *Its President.*

FIDELITY AND DEPOSIT CO. OF
MARYLAND,

By EMIL H. SELBACH, *Its Attorney-in-Fact.*

Sealed and Delivered in the presence of

Attest:

[SEAL.]

C. W. JOHNSON, *Agent.*

This bond is approved November 9, 1911.

WILLIS VAN DEVANTER,

Associate Justice.

STATE OF UTAH,

County of Salt Lake, ss:

Personally appeared before me a Notary Public in and for the County of Salt Lake, State of Utah, Emil H. Selbach, who being first duly sworn, on oath deposes and says: That he is Attorney-in-fact, for the Fidelity and Deposit Co. of Maryland, a corporation organized under the laws of the State of Maryland, and that he is duly authorized to execute and deliver the foregoing obligation; that the said Fidelity and Deposit Co. of Maryland, is authorized to execute the same, and has complied with all the laws of the State of Utah, in reference to becoming sole surety upon bonds, undertakings

and obligations. Affiant further says that William J. Barrette whose address is Salt Lake City, Utah, has been appointed attorney upon whom process for the State of Utah may be served according to law.

[SEAL.]

V. S. ANDERSON,

Notary Public.

My Commission expires —.

(Endorsed:) No. 2997. The Denver and Rio Grande Railroad Company, Plaintiff in Error, vs. The Baer Brothers Mercantile Company. Bond on Writ of Error from Supreme Court U. S. Filed Nov. 17, 1911. John D. Jordan, Clerk.

(Writ of Error from Supreme Court, U. S.)

And on the seventeenth day of November, A. D. 1911, a writ of error from the Supreme Court of the United States was filed in said cause, the original of which with the Clerk's return thereto is hereto attached and herewith returned:

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The Denver & Rio Grande Railroad Company, plaintiff in error, and The Baer Brothers Mercantile Company, defendant in error, a manifest error hath happened, to the great damage of the said defendant in error, The Baer Brothers Mercantile Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 9th day of November, in the year of our Lord one thousand nine hundred and eleven.

[Seal of the Supreme Court of the United States.]

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

WILLIS VAN DEVANTER,

Associate Justice of the Supreme Court of the United States.

Receipt of a copy of the within Writ of Error at the city and county of Denver in the State of Colorado on this 15th day of November, 1911, is hereby acknowledged.

THE DENVER AND RIO GRANDE
RAILROAD COMPANY,

Defendant in Error,

By E. N. CLARK, *Its Att'y.*

J. W. GILBERT, *Treasurer.*

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifth day of December, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

[Endorsed:] No. 2997. The Denver and Rio Grande Railroad Company, Plaintiff in Error, vs. The Baer Brothers Mercantile Company. Writ of Error from Supreme Court U. S. Filed Nov. 17, 1911. John D. Jordan, Clerk.

(Citation.)

And on the seventeenth day of November, A. D. 1911, a citation on Writ of Error from the Supreme Court of the United States was filed in said cause, the original of which with proof of service thereof is hereto attached and herewith returned:

UNITED STATES OF AMERICA, *ss:*

To The Denver & Rio Grande Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein The Baer Brothers Mercantile Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be cor-

rected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, this 9th day of November, in the year of our Lord one thousand nine hundred and eleven.

WILLIS VAN DEVANTER,
*Associate Justice of the Supreme Court
of the United States.*

On this fifteenth day of November, in the year of our Lord one thousand nine hundred and eleven, personally appeared before me, the subscriber, William B. Harrison, and makes oath that he delivered a true copy of the within citation to The Denver and Rio Grande Railroad Company.

WM. B. HARRISON.

Sworn to and subscribed the 15th day of November, A. D. 1911.
[SEAL.] MARIE L. ETCHEN,

Notary Public.

My commission expires Jany. 23, 1912.

Receipt of a copy of the within citation at the city and county of Denver, in the State of Colorado, on this 15th day of November, 1911, is hereby acknowledged.

THE DENVER AND RIO GRANDE
RAILROAD COMPANY,

Defendant in Error,

By E. N. CLARK, *Its Att'y.*

J. W. GILBERT, *Treasurer.*

[Endorsed:] No. 2997. The Denver and Rio Grande Railroad Company, Plaintiff in Error, vs. The Baer Brothers Mercantile Company. Citation on Writ of Error from Supreme Court U. S. with proof of service thereof. Filed Nov. 17, 1911. John D. Jordan, Clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains a true copy of the transcript of record as printed pursuant to the designation of Plaintiff in Error and upon which record said cause was heard and full, true and complete copies of all proceedings and record entries, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein The Denver and Rio Grande Railroad Company is Plaintiff in Error, and The Baer Brothers Mercantile Company is Defendant in Error, No. 2997, as full, true

and complete as the originals of same remain on file and of record in my office.

I do further certify that the original writ of error with the Clerk's return endorsed thereon and the original citation with proof of service thereof are hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifth day of December, A. D. 1911.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 22,969. U. S. Circuit Court Appeals, 8th Circuit. Term No. 893. The Baer Brothers Mercantile Company, plaintiff in error, vs. The Denver & Rio Grande Railroad Company. Filed December 18th, 1911. File No. 22,969.

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In the Supreme Court of the United States.

No. 893.

THE BAER BROTHERS MERCANTILE COMPANY,
PLAINTIFF IN ERROR,

VS.

THE DENVER & RIO GRANDE RAILROAD
COMPANY, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFF IN
ERROR.

STATEMENT OF CASE.

This is a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court which reversed a judgment of the Circuit Court of the United States for the District of Colorado in favor of the plaintiff, The Baer Brothers Mercantile Company, against the defendant, The Denver & Rio Grande Railroad Company, in an action to enforce an order of the Interstate Commerce Commission requiring said defendant

to pay to said plaintiff \$3,438.27, with interest thereon at the rate of 6 per cent per annum from May 6, 1907, as reparation for excessive and unreasonable charges for the transportation of 2,292,178 pounds of beer from Pueblo, Colorado, to Leadville, Colorado, as part of a through transportation from St. Louis, Missouri, to said Leadville.

In its opinion the Court of Appeals states that

"The judgment is assailed on the following grounds: (1) That the transportation by The Denver and Rio Grande Company from Pueblo to Leadville was wholly within a single state, was not under any through joint rate and was of property not shipped to or from a foreign country from or to any state or territory, so that it was beyond the control, and the claim for reparation was without the jurisdiction of the Interstate Commerce Commission; (2) That the order for reparation was unauthorized and without the jurisdiction of the Interstate Commerce Commission because it was not founded upon or accompanied by an order establishing a maximum rate to be charged, and requiring conformity thereto; (3) That the payments for which the Baer Company seeks reparation were voluntary; (4) That in the trial of the case competent and material evidence was excluded." (Rec., p. 167.)

The court said that in view of the fact that the judgment would be reversed on the second ground

stated above, it was unnecessary to consider or decide the other questions in the case. We respectfully submit, however, that if the judgment of the Court of Appeals is held to be erroneous, the Supreme Court should consider and determine all questions properly presented by the record, and not leave the case to be disposed of by piecemeal.

The rate under which said beer moved was a combination of the rate of the Missouri Pacific Railway Company from St. Louis to Pueblo, which during a part of the time covered by this controversy was 50 cents and part of the time 45 cents per 100 pounds, and the rate of the Denver & Rio Grande Company from Pueblo to Leadville, which during all of the time was 45 cents per 100 pounds; thus making the total rate during a portion of the period involved 90 cents, and during the remainder 95 cents per 100 pounds (Rec., p. 70). The distance from St. Louis to Pueblo via the Missouri Pacific Railway is about 923 miles, and the distance from Pueblo to Leadville via the Denver & Rio Grande Railroad is about 160 miles. The rate of the Missouri Pacific Company on beer in carloads from St. Louis to Pueblo was at all times filed with the Interstate Commerce Commission, and published and maintained as interstate rates. The rate of the Denver & Rio Grande Company on beer in carload lots from Pueblo to Leadville as part of a through rate from St. Louis to Leadville was never filed with the Interstate Commerce Commission, or published as an interstate rate or as any part of an interstate rate (Rec., p. 43).

On the 14th day of September, 1906, before complaining to the Commission, the plaintiff brought suit in the United States Circuit Court against the Mis-

souri Pacific Railway Company and The Denver & Rio Grande Railroad Company for recovery of damages from said defendants for excessive charges for the shipments of beer theretofore made. The alteration of the established rate of the Missouri Pacific Company being involved, this suit, while pending on a demurrer to the complaint, and before answer or trial, was, in consequence of the decision of the Supreme Court of the United States in *Texas & Pacific Railway Company vs. Abeline Cotton Oil Company*, 204 U. S., 426, on motion of the plaintiff, dismissed by the court without prejudice (Rec., pp. 81-82).

Thereafter, on the 6th day of May, 1907, the plaintiff filed its complaint before the Interstate Commerce Commission against both of said carriers for the recovery of damages from them jointly or severally, as might be found just and proper, for excessive charges for through shipments of beer theretofore transported from St. Louis to Leadville (Rec., pp. 13-19). It was alleged in said complaint that the rates charged were through rates for the whole service, and that upon the arrival of the first shipment at Leadville the said through rate was demanded by and paid to the Denver & Rio Grande Company under protest, and that as to the remaining shipments the said through rate was prepaid under protest to the Missouri Pacific Company at St. Louis, and that the rates or charges so demanded and collected were subsequently divided by said carriers between themselves. It was also alleged that said through rate was unjust and unreasonable, and that any through rate in excess of 60 cents per 100 pounds was unjust and unreasonable, and in violation of both sections

1 and 4 of the Act to Regulate Commerce (Rec., pp. 17-19).

The prayer of said complaint is as follows (Rec., p. 19) :

“Wherefore complainant prays that said defendants and each of them be required to promptly answer the charges herein; that after due hearing and investigation an order be made requiring said defendants and each of them to wholly cease and desist from said violation of said Act to Regulate Commerce as amended, and to comply with the same to the full extent thereof; that a further order be entered fixing a reasonable and just rate for the through transportation of beer in carload lots from said City of St. Louis to said City of Leadville over said defendants' said lines of railroad, to be observed by said defendants as a maximum rate for such through transportation; that a further order be entered requiring the defendants jointly or severally as may be found just and proper to pay to the complainant the sum of Seven thousand two hundred and ninety-nine dollars and twenty-seven cents (\$7,299.27) as a reparation for the damages sustained by complainant in consequence of the violations of the provisions of said Act to Regulate Commerce as amended, and that such other and further order or orders may be entered as the Commission may deem necessary in

the premises and the complainant's cause may appear to require."

In its verified answer to said complaint the Denver & Rio Grande Company incorporated the complaint filed by plaintiff in the suit in the Circuit Court which was dismissed, as above stated, and alleged the following defenses: (a) that because of said suit the plaintiff was estopped to maintain its complaint before the Commission (Rec., p. 41); (b) that defendant was not subject to the jurisdiction of the Commission, because it received the shipments described in said complaint as a connecting carrier and not otherwise, and as it would and did receive similar shipments from other shippers at Pueblo, and that it transported said shipments to Leadville as local shipments, and not under and in accordance with through bills of lading or other through billing, but only under and in accordance with its local billing from Pueblo to Leadville, and wholly within the State of Colorado, and at its regular rate then established and in force; namely, at the rate of 45 cents for each hundred pounds of such shipments; and that *said rate was never published or filed as an interstate rate or as any part of such interstate rate*, and that defendant had no arrangement with the Missouri Pacific Company for a through carriage or shipment of said beer (Rec., pp. 43-45); (c) that defendant was not subject to the jurisdiction of the Commission, because the shipments described in the complaint were by the defendant received, transported and handled wholly within the State of Colorado, and were not shipped to or

from a foreign country from or to the State of Colorado (Rec., p. 45); (d) that the circumstances and conditions of the transportation from St. Louis to Leadville were not similar to the circumstances and conditions governing the transportation from St. Louis to Salt Lake City, as alleged in the complaint, and that there was therefore no violation of the fourth section of the Act to Regulate Commerce (Rec., pp. 45-48); (e) that the payments for which reparation was sought were voluntary (Rec., p. 48); (f) and that the rates charged and collected by defendant were just and reasonable (Rec., p. 52).

At the hearing before the Commission it was conceded that the rates from St. Louis to Pueblo were just and reasonable for the performance of that part of the service, but plaintiff contended that the rate of 45 cents from Pueblo to Leadville applied to said through transportation was unjust and unreasonable, and should not have exceeded 15 cents per 100 pounds (Rec., p. 72).

After full hearing and investigation, the Commission found:

1. That the bringing of said suit in the United States Circuit Court was not a bar to the subsequent proceeding before the Commission (Rec., pp. 81-82).

2. That, owing to the location of Leadville, there was no violation of the fourth section of the act in making a greater charge from St. Louis to Leadville than from St. Louis to Salt Lake City (Rec., pp. 76-77).

3. That the Denver & Rio Grande Company, by participating in the through movement of the traffic from St. Louis to Leadville, became subject to the

act and to the jurisdiction of the Commission (Rec., pp. 70-77).

4. That it was immaterial that the part of the service performed by the Denver & Rio Grande Company was entirely within the State of Colorado, and that the transportation was not to or from a foreign country from or to the State of Colorado (Rec., pp. 73-74).

5. That, as a matter of fact, the plaintiff made each separate payment under protest, but that, as a matter of law, to maintain a petition before the Commission for the recovery of excessive freight charges, it was not necessary that the payment of the freight should have been made under protest (Rec., pp. 78-81).

6. That 30 cents per 100 pounds in carloads from Pueblo to Leadville was sufficient as applied to the movement in question, and that the Denver & Rio Grande Company had exacted from the complainant charges in excess of what would be just and reasonable by the amount of 15 cents per 100 pounds, and that said Denver & Rio Grande Company had collected of the complainant the sum of \$3,438.27 in excess of just and reasonable charges for the transportation of said beer (Rec., pp. 77-78).

The Commission in its report made the following findings relative to the establishment of a maximum rate to be observed in future (Rec., p. 83) :

“The prayer of the complaint is among other things that the Commission ‘fix a just rate for the through transportation of beer in carload lots from said City of St. Louis

to said City of Leadville.' There is no suggestion either in the complaint or in the prayer looking to the establishment of a joint rate and that subject was not referred to either upon the trial or in the argument. This being so, we ought not to establish a joint through rate and we do not think that we should undertake by our order to fix in this proceeding the locals which will make up the charge for the through movement in the future. There has been no practical difficulty in making these shipments over this route in the past. If the Denver & Rio Grande does not reduce its charges in accordance with this report, or if suitable through facilities are denied, the complainant can file its petition asking the establishment of a joint through route and rate."

The order of the Commission was in the following words and figures (Rec., p. 83) :

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had and the Commission having on the date hereof made and filed a report containing its conclusions thereon:

It is ordered that the defendant, The Denver & Rio Grande Railroad Company, be and it is hereby notified and required to pay unto the complainant, The Baer Brothers Mercantile Company, of Leadville, Colorado,

on or before the 1st day of June, 1908, the sum of \$3,438.27, with interest thereon at the rate of six per cent per annum from May 6, 1907, as reparation for excessive and unreasonable charges for the transportation of 2,292,178 pounds of beer from Pueblo, Colorado, to Leadville, Colorado, as part of a through transportation from St. Louis, Mo., to said Leadville, as more fully and at large appears in the report of the Commission in this case."

The Denver & Rio Grande Company having failed to comply with said order, the plaintiff on the 26th day of June, 1908, filed its petition in the United States Circuit Court for the District of Colorado for the enforcement of said order. The complaint before the Commission and said order of reparation were incorporated in said petition and made a part thereof (Rec., pp. 2-13).

The defendant demurred to said petition upon the ground that the order of the Commission set forth in said petition was unlawful and void, and that the court was without jurisdiction to hear and determine any of the matters recited and set forth in said petition. This demurrer was by the court overruled (Rec., pp. 22-23).

Thereupon the defendant filed its verified answer to said petition, incorporating therein as a part of said answer its answer to the complaint before the Commission and set up the same defenses urged before the Commission (Rec., pp. 24-49).

The plaintiff replied to said answer, and denied generally and specifically each and every allegation of new matter set up in said answer, except such as were expressly admitted to be true (Rec., pp. 53-57).

On the trial the defendant objected to the introduction of any evidence under said petition, upon the ground that, by reason of the failure of the Commission to prescribe the maximum rate to be observed by defendant in future, the order of reparation set out in the petition was void and no cause of action existed, and the court was without jurisdiction to try the case. This objection was overruled by the court (Rec., pp. 61-62).

Thereupon the plaintiff introduced in evidence the report and order of the Commission (Rec., pp. 69-83); also testimony showing that the rates on beer in carloads over all lines of railroad operating between St. Louis and Leadville were the same; that the rate on beer in car lots from Denver to Leadville over defendant's road, a distance of 270 miles, was 45 cents per 100 pounds; that the rate on beer in car lots from Denver to Grand Junction over defendant's road, a distance of 436 miles, was 55 cents per 100 pounds; that the rate on beer in car lots from Denver to Salt Lake City, a distance of 725 miles, was part of the time covered by the shipments in question 50 cents, and part of the time 45 cents per 100 pounds (Rec., pp. 63-69).

At the conclusion of plaintiff's evidence the defendant moved for a directed verdict, (1) upon the ground that petitioner had failed to prove that a maximum rate to be observed by defendant in future had been prescribed by the Commission, and (2) upon

the ground that the defendant was not engaged in interstate commerce in respect to the shipments in question. This motion was denied by the court (Rec., pp. 83-84).

The defendant introduced evidence relating to the movement of the cars and payment of freight (Rec., pp. 84-112); also as to the reasonableness of the rate from Pueblo to Leadville (Rec., pp. 113-120); also introduced testimony as to the physical difficulties of operating its road between Pueblo and Leadville (Rec., pp. 120-136); also evidence as to the cost of such operation (Rec., pp. 136-142). But none of the testimony given or offered by the defendant even tended to disprove any fact found by the Commission and set forth in its said report.

The Court of Appeals in its opinion declares "that the *rate* which the Denver & Rio Grande Company *charged and collected was a lawfully established rate*" (Rec., p. 169). That is to say, that said rate had been filed with the Commission and published as the rate charged for the transportation of beer in carloads from Pueblo to Leadville as part of a through transportation from St. Louis to Leadville. There is no evidence to warrant this conclusion. On the contrary, it is, as we have seen, repugnant to the sworn answer of the defendant both before the Commission and the court, and to the whole theory of the defense. It would have been an idiotic performance for the defendant to take up the time of the Commission and the trial court to prove that it was not engaged in interstate commerce, if it had voluntarily submitted itself to the jurisdiction of the Commission by filing and publishing the rate as required by the act.

Apparently this conclusion of the court is predicated upon the following inconsequent testimony of the assistant general freight agent of defendant, given on cross-examination (Rec., pp. 116-117) :

“By Mr. Harrison :

Q. Mr. Lampton, is it not a fact that the Denver & Rio Grande Railroad Company has filed with the Interstate Commerce Commission its local rate from Pueblo to Leadville on beer? A. Yes, sir.

Q. When did it do that? A. Why, my recollection is that it was either in the spring of 1907 or the fall of 1907. I am not certain which; it was after the Commission had requested that all local rates be filed with it.

Q. Have you got that request of the Commission? A. It was printed, one of their printed, what they call administrative orders.

Q. It was an order, was it not? A. No, sir, it wasn't an order, I use the word that they used, a request.

Q. Was it not a notification to you and to other roads, that while you applied a local rate to a through transportation that the Interstate Commerce Act as amended in 1906 required that you should file your tariffs? A. No, sir, that isn't the language of the Commission at all.

Q. Have you that request with you? A. No, sir, I haven't it with me, I can get it.”

At the conclusion of all the testimony the defendant moved for a directed verdict, which was by the court denied (Rec., pp. 146-147). The grounds of said motion were substantially: (1) that petitioner had failed to prove that the rate complained of had been changed according to law; (2) that the order of reparation was unlawful and void, and beyond the power of the Commission to make; (3) that the freight charges in question were paid voluntarily; (4) that the defendant was not engaged in interstate commerce; (5) that the petitioner was estopped to deny that the rates complained of were unreasonable, or to recover any sum from the defendant, for the reason that petitioner, with full knowledge of all the facts, continued to make said shipments and to pay the freight thereon at the rate complained of; and (6) that the rates complained of were just and reasonable.

Thereupon the court held that no evidence had been offered to meet the *prima facie* case made by the findings of the Commission, and directed judgment to be entered for the plaintiff, as on the verdict of the jury, for the sum of \$3,761.45 and costs, including \$500 to be taxed for plaintiff's attorney (Rec., pp. 148-151).

On writ of error brought by defendant to review said judgment, the United States Circuit Court of Appeals rendered its decision on May 18, 1911 (Rec., pp. 166-172), and held:

“ * * * that in a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully established rate has been ex-

cessive because that rate was unreasonable, the finding and prescription by the Commission of a reasonable maximum rate to be observed by all, and an order by the Commission prohibiting the use of a rate in excess thereof, are conditions precedent to the exercise of its power to order reparation. An order of reparation without such an establishment of a reasonable maximum rate is beyond the power of the Commission and void, and as no such rate was prescribed and no order forbidding the future use of an excessive rate was made in the case in hand the Commission's order of reparation in this case was beyond its power and void.

This conclusion disposes of the case in hand and renders it impossible for a judgment to be obtained against the Railroad Company upon the reparation order of the Commission upon which the action is based. It is, therefore, unnecessary to consider the other questions in the case and the judgment below is reversed." (*Italics ours.*) (Rec., p. 172.)

It was ordered that the defendant have and recover its costs against plaintiff; that the judgment be reversed, and that the cause be remanded to the Circuit Court with directions for further proceedings in accordance with the views expressed in the opinion of the court (Rec., p. 173).

On petition for rehearing, which was denied, the order was modified so that the reversal of said judg-

ment should be without cost to either party in the Court of Appeals (Rec., p. 175).

Further facts deemed material will be referred to in the argument.

ASSIGNMENTS OF ERROR.

First—Said Circuit Court of Appeals erred in entering judgment reversing the judgment of the Circuit Court of the United States for the District of Colorado for three thousand seven hundred and sixty-one dollars and forty-five cents and costs of suit, entered on the thirteenth day of November, A. D. 1908, in favor of said defendant in error and against said plaintiff in error.

Second—Said Circuit Court of Appeals erred in not affirming the said judgment of the United States Circuit Court aforesaid.

Third—Said Circuit Court of Appeals erred in holding

“that in a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully established rate has been excessive because that rate was unreasonable, the finding and prescription by the Commission of a reasonable maximum rate to be observed by all, and an order by the Commission prohibiting the use of a rate in excess thereof, are conditions precedent to the exercise of its power to order reparation.”

Fourth—Said Circuit Court of Appeals erred in holding that, in a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully established rate has been excessive because that rate was unreasonable, the finding and prescription by the Commission of a reasonable maximum rate to be observed by all, and an order by the Commission prohibiting the use of a rate in excess thereof, are conditions precedent to the exercise of its power to order reparation, and that an order of reparation without such an establishment of a reasonable maximum rate is beyond the power of the Commission, and void.

Fifth—Said Circuit Court of Appeals erred in holding that, because no previous or contemporaneous order was made by the Interstate Commerce Commission prescribing the maximum rate to be observed in future by the said The Denver & Rio Grande Railroad Company, plaintiff in error, and prohibiting the use of a rate in excess thereof in the case in hand, the Commission's order of reparation in this case was beyond its power, and void.

Sixth—Said Circuit Court of Appeals erred in holding that, because no previous or contemporaneous order was made by the Interstate Commerce Commission prescribing the maximum rate to be observed in future by the said The Denver & Rio Grande Railroad Company, plaintiff in error, and prohibiting the use of a rate in excess thereof in the case in hand, it was impossible for a judgment to be obtained against the said Railroad Company upon the order of the Commission upon which the action in this case is based.

Seventh—Said Circuit Court of Appeals erred in holding that the order of reparation herein was void.

Eighth—Said Circuit Court of Appeals erred in holding that the judgment herein of the Circuit Court was void.

Ninth—Said Circuit Court of Appeals erred in holding that the rate which The Denver & Rio Grande Railroad Company charged and collected "was a lawfully established rate."

Tenth—Said Circuit Court of Appeals erred in holding that the rate which The Denver & Rio Grande Railroad Company charged and collected had been filed with the Interstate Commerce Commission and published as an interstate rate, or as any part of an interstate rate.

Eleventh—Said Circuit Court of Appeals erred in holding that the Act to Regulate Commerce was so amended by Congress in 1906 as to impose upon the Commission the imperative duty in a case of this character to prescribe a reasonable maximum rate applicable to all, and to order the carrier to cease and desist from the use of a rate in excess thereof.

Twelfth—Said Circuit Court of Appeals erred in remanding this case to the Circuit Court with directions for further proceedings in accordance with the views expressed in the opinion of said Circuit Court of Appeals.

Thirteenth—Defendant in error says that, if the order of reparation and the judgment thereon of the Circuit Court were void because the Interstate Commerce Commission failed to make a previous or contemporaneous order prescribing a maximum rate for the future, and prohibiting any departure therefrom,

the case should have been remanded to the Interstate Commerce Commission with directions to make such order, and to postdate said order of reparation in accordance with the opinion of the court.

Fourteenth—Said Circuit Court of Appeals erred in denying the petition for rehearing, and in refusing to consider the fact that, subsequent to making the order of reparation herein, the Interstate Commerce Commission, on complaint of defendant in error, made an order fixing a maximum rate of 30 cents per hundred pounds on beer in carload lots from Pueblo, Colorado, to Leadville, Colorado, when part of a through transportation from St. Louis, Missouri, to said Leadville, and prohibiting the said Denver & Rio Grande Railroad Company from charging a rate in excess of said maximum rate.

Fifteenth—Said Circuit Court of Appeals erred in holding that the contention of plaintiff in error, The Denver & Rio Grande Railroad Company, that the transportation by it of the beer in question from Pueblo to Leadville was not subject to the Act to Regulate Commerce, nor to the jurisdiction of the Commission, "was not without great persuasive force," and in refusing to determine this and other questions in the case.

Sixteenth—Defendant in error further says that section 15 of the Act to Regulate Commerce, as construed by said Circuit Court of Appeals aforesaid, is repugnant to and in conflict with Article V of the Constitution of the United States, which declares that no person shall be deprived of property without due process of law.

Seventeenth — Defendant in error further says that under the Act to Regulate Commerce, as amended in 1906, the Circuit Court of Appeals was without jurisdiction to review the lawfulness of the said order of reparation.

Eighteenth—Defendant in error further says that the plaintiff in error, by failure to make application to the Interstate Commerce Commission for a rehearing, waived its right to object in this case that the order of reparation was invalid because the future rate was not prescribed as aforesaid.

For the purposes of convenience in argument, the foregoing specifications of error will be presented and considered under the following general heads:

A.

The Court of Appeals erred in holding that the rate charged and collected by defendant was lawfully established as an interstate rate.

B.

The Court of Appeals erred in holding that the establishment of a maximum rate to be observed by defendant in future was under any circumstances a necessary prerequisite to the validity of the order of reparation, for the following reasons:

1. THE DUTY IMPOSED UPON THE COMMISSION BY SECTION 15 OF THE ACT TO REGULATE COMMERCE, AS AMENDED IN 1906, TO PRESCRIBE THE RATE REGULATION OR PRACTICE FOR THE FUTURE AND TO FORBID A DEPARTURE THEREFROM, REFERS EXCLUSIVELY TO COMPLAINTS MADE UNDER THAT SECTION FOR THAT PURPOSE AND HAS

NO APPLICATION TO COMPLAINTS SEEKING REPARATION UNDER SECTION 16 OF SAID AMENDED ACT.

2. NO INJUSTICE TO THE CARRIER AND NO PREFERENCE OR DISCRIMINATION BETWEEN SHIPPERS CAN POSSIBLY RESULT FROM THE FAILURE TO PRESCRIBE THE FUTURE RATE.

3. THE DECISION OF THE COURT OF APPEALS IS WITHOUT PRECEDENT AND IS IN CONFLICT WITH PREVIOUS DECISIONS OF THE SUPREME COURT AND THE COMMISSION.

4. THE ACT TO REGULATE COMMERCE, AS CONSTRUED BY THE COURT OF APPEALS, DEPRIVES PLAINTIFF OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF ARTICLE V OF THE AMENDMENTS TO THE CONSTITUTION.

C.

It was not competent under the act and under the complaint before the Commission for that body to establish the local rate of the defendant to be applied to the through transportation.

D.

Under the Act to Regulate Commerce, as amended in 1906, the *lawfulness* of an order of reparation cannot be reviewed in the suit to enforce such order.

E.

The suit to enforce the order of reparation, if not collateral, is a continuation of the proceedings before the Commission, and if the latter has erred in its interpretation of the law, the case should have been remanded by the Court of Appeals to the Commission

with instructions to perform its duty, if it had not already done so.

F.

The case should not now be remanded to the Commission because on subsequent complaint by plaintiff the rate in question was established.

G.

The freight charges were paid in each and every instance under protest.

H.

It was not necessary that the payment of the freight should have been made under protest.

I.

The transportation in question was interstate commerce, and subject to the Commerce Act and to the jurisdiction of the Commission.

J.

There was no evidence given or offered tending to rebut or disprove the findings of the Commission as to the unreasonableness of defendant's rate.

BRIEF AND ARGUMENT.

A.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE RATE CHARGED AND COLLECTED BY DEFENDANT WAS LAWFULLY ESTABLISHED AS AN INTERSTATE RATE.

The court apparently concedes that the prescription of a rate for the future is not a prerequisite to the shippers' right to recover damages for excessive charges when the rate complained of is not established, and this must be true unless section 9, giving the Commission and the courts concurrent jurisdiction, is to be read out of the act altogether.

The court declares that "the rate which the Denver & Rio Grande Company charged and collected was a lawfully established rate" (Rec., p. 169). If this means anything, it must mean that the rate had been filed with the Commission and published as a separately established rate applied to the through transportation, as provided in such case by section 6 of the Act to Regulate Commerce.

There is not a word between the covers of the printed record in this case to warrant such an unqualified declaration. On the contrary, it affirmatively appears that the contention of the defendant, both before the Commission and the trial court, was that the transportation in question was not a through transportation; that there was no through route, and that its rate was *never* published or filed as an interstate rate or as any part of an interstate rate (Rec., p. 43). The testimony of the defendant was largely devoted to an attempt to prove that it was not engaged in interstate commerce, and the Court of Appeals declares that its contention was "not without great persuasive force" (Rec., p. 169). Manifestly, the Commission would not have taken the time and trouble to hear evidence and make findings on a question which it must have known was settled by the records of its office.

The only evidence in the record relating to the filing of this rate with the Commission is, as we have seen, the testimony of defendant's freight agent, given on cross-examination, to the effect that in the *spring* or *fall* of 1907 the rate in question was filed with the Commission, in compliance with its *request* that *all local rates* be filed with it (p. 13, *supra*).

Besides being too indefinite as to the time of such filing, it goes without saying that the mere filing indiscriminately of *all local intrastate rates* with the Commission at its *request*, without any investigation or hearing, and without any reference to any existing through route or through transportation, and without publication, could not have the effect of establishing such of said rates as might *happen* to apply to through shipments.

Manifestly, no inference can possibly be drawn from such testimony that there was any intention on the part either of the Commission or of the defendant that a compliance with the request of the Commission should or could be considered as the filing of any particular separately established rate applying to any through transportation over any through route, and in justice to the defendant it must be conceded that it has never so stultified itself as to contend directly or indirectly that its compliance with said request had any such effect, or that the rate in question was ever in any way or at any time established as an interstate rate. The conclusion, therefore, is that the judgment of the Court of Appeals is predicated upon a material fact that did not exist, and that for that reason alone said judgment should be reversed.

B.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE ESTABLISHMENT OF A MAXIMUM RATE TO BE OBSERVED BY DEFENDANT IN FUTURE WAS UNDER ANY CIRCUMSTANCES A NECESSARY PREREQUISITE TO THE VALIDITY OF THE ORDER OF REPARATION, FOR THE FOLLOWING REASONS:

1. *The duty imposed upon the Commission by section 15 of the Act to Regulate Commerce, as amended in 1906, to prescribe the rate regulation or practice for the future, and to forbid a departure therefrom, refers exclusively to complaints made under that section for that purpose, and has no application to complaints seeking reparation under section 16 of said amended act.*

Prior to the amendment of 1906 the power to make both administrative and judicial orders was conferred upon the Commission by section 15 of the act, which provided:

"That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission

to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to *cease and desist from such violation*, or *to make reparation* for the injury so found to have been done, *or both*, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

It will be observed that by the above section it was made the *duty* of the Commission to notify the carrier (1) to cease and desist from violating the act, or (2) to make reparation for the injury found to have been done, or (3) to both cease and desist from violating the act and to make reparation. The Commission put the following obvious construction upon this section in *Cattle Raisers' Assn. vs. C. B. & Q. R. Co.* (10 I. C. C., 83):

"This Commission may under the act make orders of two kinds. It may make an administrative order which refers to the future, or it may award damages for what

has transpired in the past. The purpose and scope of these two orders is entirely different. The methods of enforcing them are equally distinct. In one case application is made to a court of equity which determines all questions of fact and employs, if need be, its mandatory powers in the enforcement of the orders. In the other case a suit at law is brought, in which the issue of fact is decided by jury. These two orders may be made in the same case, but they are in no way connected and the right to make one is not necessarily conclusive of the right to make the other. If, for example, upon a complaint alleging the unreasonableness of a rate and demanding reparation the Commission should find the rate unreasonable and order the carrier to charge for the future a given rate which was determined to be reasonable, that order would be invalid because beyond the power of the Commission, and the court would decline to enforce it, but the refusal of the court to enforce such an order would be no bar to the right of the Commission to grant reparation to the extent that the carrier had exacted more than a reasonable rate in the past."

The Court of Appeals says that Congress saw the *vice* and *injustice* of this state of the law, and the *preferences* and *discriminations* and *gross injustice* to the carrier to which it gave unavoidable effect, and so amended the law in 1906 as to make it the *imperative duty* of the Commission, *before ordering reparation*, to

prescribe the maximum rate for the future and prohibit a departure therefrom.

Until the adoption of the Hepburn Act the only remedy for unlawful rates was by way of damages. Besides being necessary for the prevention of extortion, it was and still is one of the most effective remedies against discrimination. The power to fix rates was not conferred upon the Commission for the purpose of establishing a new relation between administrative orders and orders of reparation, but for the sole purpose of enabling the Commission to establish maximum rates for the future, whenever it was of opinion that an existing rate was unreasonable. The necessity for giving the Commission this power was not, as the Court of Appeals intimates, a new and sudden discovery. The Commission claimed the right under the original act. The right was resisted by the carriers and denied by the courts. After the successful opposition of the carriers for twenty years, Congress was finally forced to yield to the demands of the public and gave the Commission power to fix rates. We will show presently that none of the calamities mentioned by the Court of Appeals will happen in any degree from an award of damages without exercising this new power. But if it were otherwise, the evil should not be corrected by judicial legislation.

Section 15 of the act, as amended in 1906, provides:

"That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this

Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

It will be observed that section 15 as amended omits any reference to reparation and limits the powers conferred, and duties imposed thereby, to the prescription of the rate regulation or practice for the

future, and to orders enjoining obedience thereto. The power and duty to award damages is taken out of section 15, and separately conferred and unconditionally imposed by the following provision added by said amendment to section 16:

“That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission *shall* make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.”

The effect of the decision of the Court of Appeals is to read into section 16 as prerequisite conditions to the validity of the order of reparation the performance by the Commission of the administrative duties imposed by section 15. We submit that the only legitimate inference to be drawn from these amendments is that Congress intended to emphasize rather than abolish the previous authority to make the order of reparation without reference to the performance of any administrative duty; the manifest purpose being to avoid the very confusion that has been dragged by the neck into this case. No doubt, if the allegations of the complaint for reparation and the evidence warrant, the order prescribing the rate and the order of reparation may be made in the same case and at the same time. But a shipper seeking reparation is not required to state and establish both causes

of action and procure both orders. The two proceedings are just as distinct as if separate complaints had been filed.

"It is one thing to inquire whether the rates which have been charged and collected are reasonable,—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future,—that is a legislative act." *G. C. C. vs. C. N. O. & T. P. R. Co.*, 167 U. S., 479.

Rates are fixed to take effect in the future. Damages are awarded for the exaction of unreasonable rates in the past. The order of reparation is founded solely upon the determination by the Commission of what *was* a reasonable rate at some time in the past. The order prescribing a rate is founded upon the determination by the Commission of what *will* be a reasonable rate for the future.

As the law by interpretation of the courts now stands, the shipper is required *nolens volens* to proceed in the first instance before the Commission, and, no matter how erroneous or unjust its decision may be, it is final as to him, and he is bound to submit. If the shipper is fortunate enough to secure a substantial award of damages, he is required to bring another original suit in the federal court for its enforcement. This suit, it was held prior to the amendment of 1906, may be tried *de novo* as to the *law* as well as the *facts*, except that the recovery is limited to the amount awarded by the Commission.

Manifestly no ordinary shipper can afford to assume the risks incident to such an unequal and bur-

densome contest, and if the carrier may now defend the suit to enforce the award upon the further ground that the Commission has failed to perform some legislative or administrative duty over which the shipper has no control, and as to which he has no duty to perform, then the statutory remedy for extortion is a delusion and a snare, and few, if any, shippers will have the courage, even if they have the means, to risk their money and time in any such game of chance; and as a result the most potent of the remedies provided by the act for the prevention of discrimination, as well as extortion, will be practically destroyed.

The established rule of practice and procedure in courts exercising common-law and equity jurisdiction is that in case of damages arising from a public nuisance, or when one or more persons are injuriously affected by a continuing trespass, and the injury is of such a nature that it cannot be fully compensated in damages, the court will, if its equity jurisdiction is invoked, interfere to prevent the continuance of the wrong; but such equitable relief is additional to the recovery of damages. The person injured is not required to ask for equitable relief, and he may be entitled to recover damages although the circumstances are such that he is not entitled to equitable relief. In conferring similar power on the Commission to award damages and to abate the evil, it will not be presumed that Congress intended to overthrow these long-established principles beyond what is expressly declared. The act does not require the shipper, seeking damages before the Commission for excessive freight charges, to ask for the establishment of a reasonable maximum rate for the future, and there is

no intimation in the act that the granting of such relief should be a prerequisite to a valid award of damages, or that the action of the Commission or its failure to act in respect to the prescription of the future rate regulation or practice should in any manner prejudice or delay the shipper's right to damages. On the contrary, the great variety and importance of the administrative, legislative and judicial duties imposed by the act upon the Commission make it necessary, in the interest of the public and to the ends of justice, that the Commission should have a large discretion in respect to the performance of these duties, and the act clearly indicates that this was the intention of Congress.

The Commission is authorized to conduct its proceedings in such manner "as will best conduce to the proper despatch of business and to the ends of justice" (sec. 17). The order fixing the rate may, in the discretion of the Commission, be made to take effect at such time in the future, and be continued for such period not exceeding two years, as the Commission may see fit; or the Commission may at *any time* suspend or modify the order, or set it aside altogether (sec. 15). We submit that there is no substantial difference between the power to do or refrain from doing a certain thing (which is discretion), and the duty to do a certain thing coupled with the power to immediately undo it.

A duty imposed by law upon a tribunal becomes specific only when, in the opinion of that tribunal, a case or state of circumstances exists proper for its discharge. In the case at bar the Commission was of the opinion that a proper occasion had not arisen for the

immediate exercise of the duty to prescribe the rate for the future. Beyond controversy, this conclusion was within the scope of its delegated authority, and this court has said that it cannot, under the guise of exerting judicial power, usurp the functions of the Commission upon its conception as to whether the power has been wisely exercised.

Interstate Com. Com. vs. Ill. C. R. Co.,
215 U. S., 452.

Interstate Com. Com. vs. Union P. R. Co.,
32 Sup. Ct. Rep., 108.

Ill. C. R. Co. vs. Interstate Com. Com., 206
U. S., 441.

Proctor & Gamble Co. vs. United States, 32
Sup. Ct. Rep., 761.

2. *No injustice to the carrier and no preference or discrimination between shippers can possibly result from the failure to prescribe the future rate.*

The Court of Appeals says that, unless the rate for the future is prescribed, the carrier *must* continue to collect the rate found to be unreasonable under heavy penalties, subject to a liability to repay such *indeterminate* amounts as the Commission might deem after the event to be excessive (Rec., p. 171). Even if this was true, it would not apply in the case at bar, for the reason, as we have seen, that the rate in question was not an established rate.

But it is not true that the carrier *must* continue to collect the established rate. The act provides that the rate may be changed on thirty days' notice, or *immediately* with the consent of the Commission (sec. 6). The Commission in this case not only con-

sented, but warned the defendant that it *must* reduce its rate to the amount found to be reasonable. It could, therefore, have done so without any delay whatever. But, instead of complying with the law, the defendant defies it and brazenly asks the court to relieve it from paying the damages awarded, because it has not by a formal order been compelled to obey the law.

We submit that there is no inconvenience so great, no hardship so imperative, as will entitle a carrier to any standing in any court to make such a defense. Moreover, if, after a full hearing on the complaint for reparation, the Commission has found a given rate unreasonable, and has found what is a reasonable rate, and awarded damages for the difference between the two, it is a reflection on the intelligence and integrity of the Commission to say that future awards will be *indeterminate*. True, it is barely possible that, owing to changes in circumstances and conditions, future awards may vary in amount; but this is a very remote contingency, and one which may prove quite as favorable to the carrier as to the shipper.

The Court of Appeals also says

"that in the absence of the establishment of a standard of reasonableness by an order of the Commission an undue preference and an unjust discrimination is likely to arise from every such order of reparation, and the main object of the Interstate Commerce law is likely to be defeated thereby. Other shippers have been, and all shippers continue to be

required to pay the railroad company's established rate under penalties denounced by section 1 of the Interstate Commerce Act as amended, for receiving any rebate or concession from that rate, and their only chance of relief is an order of reparation like that granted to the Baer Brothers Company for some indeterminate amount." (Rec., p. 171.)

We submit that the only discrimination that could possibly arise between shippers from an award of reparation without prescribing the future rate is the contingency that one shipper may receive the legitimate reward of his diligence, while others who have been negligent or indifferent may receive nothing. So far as the Commission is concerned, all shippers who have suffered damages in the past, or who may suffer damages in the future, by reason of the exaction of a rate in excess of that found by the Commission in the first instance to be reasonable, stand upon exactly the same footing, and if all choose to assert their rights before the Commission, they will all be entitled to, and will undoubtedly receive, the same measure of relief. If there is any shipper who is not satisfied with the continuance of the extortionate rate, he is at liberty to proceed by proper complaint to have a reasonable rate established. No shipper, however, is bound to assume that burden and expense for the benefit of all as a condition precedent to his unqualified statutory right to recover back money extorted from him in violation of the law. In other words, the shipper should not be obliged to buy justice.

Not only can no discrimination arise from an award of damages without prescribing the future rate,

but the immediate and indiscriminate prescription of such rate would in many cases result in serious discrimination and preferences. For example, the rate on beer in carloads from St. Louis to Leadville is supposed to be relatively equal to the rates on beer in carload lots from St. Louis to all other points on defendant's road. The prescription of the new rate, without giving defendant an opportunity to readjust its schedules, necessarily destroys the relative uniformity and legality of such rates on the entire system. While this would not be a valid objection to the immediate award of damages, the Commission should not be required to shut its eyes to the consequences of its acts, but should be left free to adopt such course as in its judgment will, under the circumstances, best conduce to the ends of justice and to the accomplishment of the purposes of the act.

3. *The decision of the Court of Appeals is without precedent, and is in conflict with previous decisions of the Supreme Court and the Commission.*

The Court of Appeals says that, in *Texas & Pacific R. Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 426, the Supreme Court also saw the vicious consequences of awarding reparation without prescribing the future rate, and asserts that it was decided in that case

“that a shipper seeking reparation predicated upon the unreasonableness of a rate could maintain no action in the State Court therefor, until the Interstate Commerce Commission had prescribed a reasonable maximum rate for the future and had prohibited the use of a rate in excess thereof and

had thereby fixed a uniform standard of reasonableness." (Rec., p. 170.)

We respectfully submit that the Court of Appeals is mistaken. We find nothing in the Abilene decision which either expressly or by implication warrants the conclusion attributed to it, and it would be very strange if we did. That decision was expressly restricted to the state of the law as it existed prior to the amendment of 1906, when the Commission had no power to prescribe maximum rates. The decision in the Abilene case was:

"That a shipper seeking reparation predicated upon the unreasonableness of the established rate must under the act to regulate commerce primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable."

The reasons stated by the Supreme Court which led to this decision were that the tribunal charged with the duty of executing and enforcing the provisions of the act should first pass upon the *reasonableness* of the rate in order to prevent conflict between the Commission on the one hand, and the courts and juries on the other, and thereby insure, as far as possible, uniformity in the measure of damages awarded to shippers. It is by no means certain that any greater uniformity was secured by this decision, in view of the fact that the shipper must bring suit

at law for the enforcement of the order of reparation, and the court and jury may still disagree with the Commission. However this may be, subsequent decisions of the Supreme Court explain that the Abilene decision only required that the Commission should first declare the rate to be *unreasonable*, and have the *opportunity* to exert its administrative functions; that, when this was done, the foundation for reparation, as provided in the Interstate Commerce Act, was established. In other words, the court decided that in certain cases the Commission primarily had exclusive jurisdiction, but it did not decide or say how that jurisdiction should be exercised.

Southern R. Co. vs. Teft, 206 U. S., 428.

Baltimore & Ohio R. Co. vs. Pitcairn Coal Co., 215 U. S., 481.

The sole justification for the Abilene decision was that the Commission was the only authorized tribunal capable of enforcing the policy of the act. If this be true, then it should be permitted to enforce it without being continually hampered in the exercise of its superior wisdom by the imposition of conditions and restrictions which conflict with its judgment.

In Robinson vs. Baltimore & Ohio R. Co., 32 S. C. Rep., decided since the decision of the Court of Appeals in the case at bar, the question involved was identical with the question decided in the Abilene case. Robinson brought suit in court in the first instance to recover damages predicated upon the unreasonableness of an *established* rate. In the Abilene case it was held, as we have seen, that this could not be done, but that in such case the shipper must seek

redress primarily through the Commission, because that body alone was vested with power originally to entertain proceedings for the alteration of an *established* schedule.

It is apparent that the question in the Robinson case could have been disposed of by mere reference to the Abilene decision. But, contrary to its previous interpretations of that decision, and without any occasion therefor, the court said in its opinion that *an order of the Commission requiring the carrier to correct any non-conformity to the prescribed standard, and awarding damages to the injured party*, should be a prerequisite to the right to seek reparation in the courts because of exactions under an *established* schedule. We submit that this dictum was unnecessary to the decision of the point which the court was called upon to consider, and that it should not preclude a full and original consideration of the question. The Robinson case, however, is not in point, for the reason that in the case at bar the damages were not predicated upon the unreasonableness of an *established* rate. There was no "prescribed standard" to be corrected.

The decisions of the Commission cited by the Court of Appeals in its opinion are not in point. They were cases where the carrier conceded the rate to be unreasonable and was willing to refund the excess. The proceeding is informal and is required under a standing rule of the Commission to prevent rebating. The chief object of the proceeding is to determine and prescribe what will be the just and reasonable rate to be thereafter observed. The order authorizing the refund is merely an incident. On the other hand, a

complaint by a shipper to the Commission under section 9 of the Act is in the nature of a plenary suit, the chief object, and it may be the only object, of which is to recover damages. The prescription of a maximum rate for the future, if made at all, is a mere incident to such suit.

In *Steinfeld & Co. vs. I. C. R. R. Co.*, 20 I. C. C. Rep., 12, a much later case than those cited by the court, the Commission held:

"That a rate reasonable as of day may have been unreasonable in the past or may become unreasonable in the future. It is not necessarily required by the law that the rate found to be unreasonable at the time of the complaint shall be prescribed for the future, or that a rate for the future must as a prerequisite to reparation be prescribed."

4. *The Act to Regulate Commerce, as construed by the Court of Appeals, deprives plaintiff of his property without due process of law, in violation of Article V of the amendments to the Constitution.*

Under the allegations and prayer of the complaint, the alteration of the established local rate of the Missouri Pacific Company was indirectly involved. It could not be said before the hearing which of the defendants was, or whether both were, liable for the excessive through charges complained of. It was therefore considered necessary, under the *Abilene* decision, to complain primarily to the Commission. In doing so, the plaintiff has complied with every requirement of that decision. Furthermore, we believe

that there is grave doubt whether the Abilene decision should be considered as a precedent for any purpose, for the reason that the statute, as construed by that decision, denies the shipper the right of trial by jury and deprives him of his property without due process of law, in violation of the fifth and seventh amendments to the Constitution. Neither in the Abilene case nor in any subsequent case does it appear that the attention of the Supreme Court has been called to this question, and inasmuch as the principles announced in that case are made the scapegoat for the doctrine announced in the case at bar, we respectfully present the question to the court for its consideration.

Section 9 of the act provides:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

The Supreme Court held in the Abilene case that, to avoid discrimination, it must be implied that the

right of election was not intended to apply when the alteration of an established rate was involved; that in such case the shipper must primarily invoke redress through the Commission. As carriers are required under heavy penalties to file with the Commission and publish all interstate rates, it must be assumed that they will obey the law. If they do, then no occasion can arise for the exercise of the right of election, and section 9 under the Abilene decision becomes a dead letter. At least, the possibility of cases arising for the exercise of the right of election is too remote, and the necessity for making any such distinction between interstate commerce rates which are established and those which are not established is too trivial to account for the deliberate adoption of this section. We believe that the court overlooked the real object and purpose of section 9, which, we respectfully submit, was to secure to the shipper his constitutional right to trial by jury. There is no appeal from an order of the Commission, however erroneous or prejudicial it may be to the shipper. This circumstance is of itself a sufficient reason for concluding that Congress did not intend to make that remedy imperative and exclusive in any case, or class of cases. But, apart from this circumstance, Congress has no power to deprive shippers, or any particular class of shippers, of the right to trial by jury, which is guaranteed by the Constitution to the plaintiff as well as to the defendant; to the shipper as well as to the carrier. The election to complain to the Commission, if voluntarily exercised, operated, and was evidently intended to operate, as a waiver of the right to trial by jury. While thus carefully preserving the right of the ship-

per, the original act omitted to preserve the equally absolute right of the carrier to a jury trial. To remedy this defect, the act was so amended in 1889 as to require suit at law to be brought in the federal court for the enforcement of the order of reparation, and to compel the trial of such suit by jury, unless a jury was waived in writing by both parties.

It cannot be seriously doubted, we think, that the constitutional guaranty of the right to trial by jury in an action for damages was intended for the benefit of the plaintiff as well as the defendant. Ordinarily the question as to this right of the plaintiff arises on motion for a compulsory non-suit, the wrongful granting of which is unlawful because the plaintiff is thereby denied the right of trial by jury.

Elmore vs. Grymes, 1 Pet., 469.

DeWolfe vs. Raband, 1 Pet., 598.

Crane vs. Morris, 6 Pet., 598.

Castle vs. Ballard, 23 How., 172.

M—— Mut. Ins. Co. vs. Folsom, 18 Wall., 237.

Oscanyon vs. Winchester Repeating Arms Co., 103 U. S., 261.

Central Trans. Co. vs. Pullman Palace Car Co., 139 U. S., 24.

The general rule is that any legislative act which destroys or materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional. No doubt Congress intended, so far as constitutional limitations would permit, to give the Com-

mission exclusive jurisdiction to administer and enforce the Act to Regulate Commerce. But it seems clear that the sole purpose of giving persons claiming damages the option to complain to the Commission or to bring suit in the federal court was to avoid conflict with the Constitution, and that the remedy as written in the statute is lawful solely because it is optional. It may have been assumed that these constitutional rights were sufficiently secured in the action at law to enforce the order of reparation. But the shipper is limited in his recovery in such action to the amount of the order, which may be much less than he claims, and thus be denied the right to have his full damages assessed by a jury. Or the Commission may, without the intervention of a jury, refuse to award any damages at all, in which case the shipper is without redress by appeal or otherwise.

But whether the Abilene decision was right or wrong, it is certain that the question decided by the Court of Appeals was not involved in that case, or in any other case that we have found. There is absolutely no precedent for that decision. It must stand or fall as a new and original doctrine, according as this court may decide in the case at bar. We insist that the doctrine announced in the case at bar imposes a condition upon the plaintiff's right to an award of damages which plaintiff had no power to comply with and no power to enforce compliance, and that such condition operates to destroy plaintiff's right and to deprive it of its property without due process of law.

C.

IT WAS NOT COMPETENT, UNDER THE ACT AND UNDER THE COMPLAINT BEFORE THE COMMISSION, FOR THAT BODY TO ESTABLISH THE LOCAL RATE OF THE DEFENDANT TO BE APPLIED TO THE THROUGH TRANSPORTATION IN FUTURE.

The complaint before the Commission sought to recover damages predicated upon excessive *through rates* charged and collected for the *through* transportation of beer in car lots from St. Louis to Leadville. The local rates were not mentioned in the complaint. The Commission said that it did not think that it should undertake by its order to fix in this proceeding the locals which would make up the charge for the through movement in future. This finding was in accordance with the view of the Commission, expressed less than a month before, in *Merchants Traffic Ass'n vs. N. Y., N. H. & H. R. R. Co.*, 13 I. C. C. Rep., 225. The Commission said:

"While, however, it is our opinion that this rate should be reduced as above, we do not think that any order to that effect can properly be made upon this record. This rate to Denver is not a joint through rate but is made up of the local rate from New England to St. Louis plus the rate from St. Louis to Denver or in some cases from St. Louis to Kansas City and from Kansas City to Denver. We might perhaps order a reduction of these several locals to such an extent as to bring the entire rate within the figure named by us; *but we are really passing upon a*

through rate from New England to Denver and no such rate is now in existence. The proper method to follow in cases like this when no joint rate exists is to cite before the Commission the proper defendants, praying the establishment of a through route and joint rate." (Italics ours.)

The Commission also said in its report in the case at bar that the language of the prayer of the complaint was not sufficient to warrant it in establishing a through route and joint rate. We think that the Commission was mistaken, especially in view of the familiar rule that the allegations of a complaint, and not the prayer, determine the extent of the relief that may be granted. No through route or joint rate, and no through rate by combination of established locals, existed in this case. The through rate complained of began and ended with each shipment. All that the Commission could do was to establish an original through joint rate in the manner authorized by the act. This was discretionary with the Commission. In such case the statute does not say that it shall be the *duty* of the Commission, but that the Commission *may* establish through routes and joint rates (sec. 15).

The effect of establishing the separate locals applicable to a maximum through rate would have been equivalent to the prescription of a joint rate and the division thereof between the carriers, without giving the carriers the opportunity accorded by the act of agreeing upon such division. We do not believe that such a course would have been proper, but we do be-

lieve that substantial justice was done within the law by giving the defendant an opportunity to readjust its schedules and to reduce its rate in accordance with the report of the Commission. In other words, the Commission determined in effect that 90 cents per 100 pounds from St. Louis to Leadville was an unreasonable charge for the through transportation, and that 75 cents was sufficient. It also found that 45 cents from St. Louis to Pueblo, and 30 cents from Pueblo to Leadville, were reasonable locals to apply to the through transportation found to be reasonable. All of this was necessary and proper in order to determine the amount of damages and to fix the responsibility therefor. The question is: Was the Commission authorized to prescribe the rate which defendant should charge in future? Or, to put the question in a more general way, if a through rate resulting from a combination of separately established locals is found to be unreasonable, and each of the locals applied to the through transportation is found to be excessive, or some excessive and others not, is the Commission authorized to prescribe the locals which will bring the total rate within the amount found to be reasonable, without first giving the carriers an opportunity to agree among themselves upon the apportionment or division of such total rate? We think not. Such a proceeding would have every substantial feature of a proceeding for the establishment of a maximum joint through rate, in which case the act provides that the Commission may establish joint rates, and that, if the carriers

“fail to agree among themselves upon the apportionment or division thereof, the Commis-

sion may *after hearing* make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order." (Sec. 15.)

We submit that it would be a manifest evasion of the law for the Commission to determine, without prescribing, what was a reasonable through rate, and to make an order prescribing, as maximum rates to be observed in future, the proportion of such through rate to be received by each carrier, without giving the carriers an opportunity to agree among themselves upon the apportionment or division of such through rate.

Section 6 of the act, as amended in 1906, provides that

"if no joint rate over the through route has been established the several carriers in such through route shall file, print and keep open to public inspection as aforesaid the separately established rates, fares and charges applied to the through transportation."

It may be said that under this provision of the law the Commission is authorized to determine, without prescribing, what will be a reasonable through rate, and to order the carriers to apportion such rate among themselves, and to establish and observe as maximum the separate rates so agreed upon. This,

in our opinion, would prove a very unsatisfactory way of establishing a through rate. So long as the carriers failed to agree upon a division of the through rate, there would be no reduced rate in force which they would be bound to observe; whereas, if a joint through rate was prescribed in the first instance, and the carriers enjoined to observe it, no one but themselves would be concerned if they never agreed upon a division of the joint rate.

We think, therefore, that the Commission was right in this and other cases in holding that the proper course to pursue was to establish a joint through rate, and that it ought not to undertake to fix the locals which would make up the through rate found to be reasonable.

But we submit that whether the Commission should have established a joint through rate, or whether it should have established the locals which combined would make a reasonable through rate, or whether the conclusion of the Commission that it ought not to do either under the complaint before it, are questions the correct solution of which by the Commission should not be required as a condition precedent to the validity of the order of reparation.

At the hearing of this case before the Commission the complainant conceded that the local rate of the Missouri Pacific from St. Louis to Pueblo was a reasonable charge for the performance of that part of the service (Rec., p. 72). But this was only for the purpose of determining which defendant was responsible for the excessive through charges. The defendants still had the right primarily to divide the reduced through rate between themselves in such proportions

as they might see fit. The effect of the Commission's decision in this case was to give them this right, and, the defendant having failed to reduce and establish its rate, the plaintiff, in accordance with the suggestion of the Commission, filed a second complaint against both defendants, praying for the establishment of a joint through route and rate, in which case, the defendants having had ample opportunity to agree upon a different division of the through rate found in this case to be reasonable, the Pueblo-Leadville rate was reduced and established by the Commission. Whatever may be said about the method of procedure, it is certain that justice was done; which is all that the law requires.

D.

UNDER THE ACT TO REGULATE COMMERCE, AS AMENDED IN 1906, THE LAWFULNESS OF AN ORDER OF REPARATION CANNOT BE REVIEWED IN THE SUIT TO ENFORCE SUCH ORDER.

The Interstate Commerce Commission is an inferior tribunal whose jurisdiction depends upon facts which it is required to ascertain and settle. The decision of such a tribunal upon the facts essential to the existence of its jurisdiction is conclusive against collateral attack.

Peters vs. McClannahan, 52 Ala., 55.

In re Grove vs. Street, 61 Cal., 438.

Evansville etc. R. Co. vs. City of Evansville, 15 Ind., 395.

Millikin vs. City of Bloomington, 72 Ind., 161.

- City of Delphi vs. Stalzman, 104 Ind., 343.
 Dowdy vs. Wamble, 110 Mo., 280.
 State vs. Wilson (Mo.), 115 S. W., 567.
 Comstock vs. Crawford, 3 Wall., 396.
 I. C. C. vs. Lehigh Valley R. Co., 47 Fed.,
 177-179.

When the jurisdiction of an inferior court has once attached, its subsequent proceedings are presumed to be as regular as those of a court of general jurisdiction. The jurisdiction existing, the subsequent action of the court is the exercise of its judicial authority, and can only be questioned in a direct proceeding.

- Comstock vs. Crawford, 3 Wall., 396.
 Smith vs. Engle, 44 Iowa, 265.
 Mankin vs. Steele, 32 Turn., 206.
 Cushman vs. Bush (Ky.), 83 S. W., 1039.
 Porter vs. Rountree, 111 Ga., 369; 36 S. E., 761.
 Cromwell vs. County of Sac., 94 U. S., 352.
 United States vs. Arredondo, 6 Pet., 729.
 Pearse vs. Hill, 163 Mass., 493; 40 N. E., 765.
 Harshman vs. Knox County, 122 U. S., 317-318.
 Freeman on Judgments, secs. 16-249 and 531.
 Interstate Com. Com. vs. Union P. R. Co.,
supra.

Prior to the amendment of 1906, section 14 of the act required the Commission to include in its report the findings of fact upon which its conclusions both of law and fact were based, and section 16 authorized the court to enforce only *lawful* orders of the Commission, and, if a jury was waived, to try the issues in the case.

Under this state of the law, and when it was supposed to be optional with the shipper whether he would seek redress from the Commission or the courts, it was held that only *lawful* orders could be enforced, and that the suit for enforcement of the order must be tried *de novo* as to the *law* as well as the facts.

Western New York R. Co. vs. Penn Refining Co. (3rd C. C. A.), 137 Fed., 343.

I. C. C. vs. Lehigh Valley R. Co., 49 Fed., 177.

In the latter case Judge Acheson intimated that, unless the act had specifically provided that the Commission's findings of fact should be *prima facie* evidence *only*, these findings might be held to be conclusive, in accordance with the principle that when the law has confided to a special tribunal the authority to hear and determine certain matters in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive on other tribunals.

The provisions of the act referred to, upon which said decisions were predicated, were radically changed by the amendments of 1906. By these amendments section 14 only requires the Commission to include in its report the findings of fact on which the *award*

is based, and by section 16, as amended, the word *lawful* (orders), and all other provisions relating to the procedure for enforcement of orders of reparation, is expunged, and in lieu thereof the following provision was adopted:

"That if after hearing on a complaint made, as provided in Section thirteen of this Act the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled, on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant or any person for whose benefit such order was made may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

The causes or wrong for which damages are claimed in the case at bar, as set forth in the Report

and Order of the Commission, are for excessive and unreasonable charges for the transportation of 2,292,178 pounds of beer from Pueblo, Colorado, to Leadville, Colorado, as part of a through transportation from St. Louis to Leadville. The *findings* of the Commission which are made *prima facie* evidence are the facts upon which the *award* is based; that is to say, the facts relating to the reasonableness of the charge; and the *order* is an order directing the carrier to pay to the complainant the sum to which he is entitled. Whether or not the Commission had jurisdiction, or whether protest was necessary, or whether the Commission had power to award reparation, are questions of law, or mixed questions of law and fact, with which the jury have nothing to do.

"The right of trial by jury secured by the federal constitution is a trial according to the course of the common law and *is confined to matters of fact only.*"

In re Martin Fed. Cas. No. 9154, 2
Paine, 348.

The purpose of the amendment of section 16 in 1889, and the only purpose, was to preserve the carriers' constitutional right to trial by jury of such issues as were within the province of the jury, and it may be doubted if it was ever intended that the court should review the findings of the Commission on any issue of law which it had jurisdiction to decide, and with which a jury could have nothing to do. But be this as it may, it is clear that the Hepburn Act has swept away the grounds of the decisions requiring the suit to be tried *de novo* as to the *law*, and that

some other reason must be found to support that conclusion. Since the shipper is now compelled to seek redress from the Commission, and to submit to its despotic power to grant or deny him any relief, it would seem but a small measure of justice that, when the Commission does award him damages, its order should be given all the force and effect possible under the law.

It is expressly provided by the Hepburn Act (sec. 16) that the federal courts shall have jurisdiction of suits brought against the Commission to enjoin, set aside or annul *any order* of the Commission. The act now vests this jurisdiction in the Commerce Court. It will be said, no doubt, that this provision refers to administrative orders only. But, in every other instance when this was the intention, the act expressly excepts *orders for the payment of money*. The fact that no such exception is made in this instance is a strong indication that none was intended. But this is immaterial. The general equity jurisdiction of the federal courts to grant injunctions in cases involving interstate commerce exists independent of this provision of the Hepburn Act (*In re Lennon*, 166 U. S., 548). If this general jurisdiction is not vested in the Commerce Court, it remains in the federal courts.

When the Commission prescribes the future rate without awarding reparation, that ends the matter so far as the shipper is concerned. But we submit that when the Commission awards reparation with or without prescribing the future rate, the carrier, if it wishes to assail the *lawfulness* of either or both orders, should be required to bring suit in the federal

court or Commerce Court against the Commission and *the shipper*, to enjoin, set aside or annul the same. If the carrier succeeds in such suit in having the order of reparation set aside, then no suit will or can be brought to enforce it. If, however, the carrier fails to secure the annulment of the order of reparation, then the *law* of the case is settled; but in the suit to enforce such order the carrier is still entitled to defend and have the jury pass upon the reasonableness of its charges and the measure of damages. Such a course of procedure will avoid the usual spectacle of having the same questions involved in two suits pending at the same time in different forms, in one of which the shipper may be deprived of the damages awarded him without any opportunity of being heard.

There is another reason why the defendant should be estopped to say that the order of reparation in this case is void because the future rate was not prescribed.

By the amendment of 1906 it was for the first time expressly provided that any party might apply for a rehearing of any decision, order or requirement made by the Commission (sec. 16a). If, therefore, the carrier determine to undertake subsequent proceedings, it is proper, under the rule that one ought to exhaust his remedy or defense in the tribunal of first instance before proceeding by way of appeal or review, to apply for a rehearing. This is particularly true as to the decision of the Commission in this case in respect to the prescription of the future rate. If the defendant believed that the order of reparation was void because of some irregularity on the part of the Commission, or that no valid order could be made

under the complaint, it was its duty to bring the matter to the attention of the Commission by demurrer or by petition for rehearing. The defendant should not be permitted to withhold its defenses, either of law or fact, and spring them for the first time at the trial for the enforcement of the order. Such conduct is inconsistent with the intent to take advantage of the alleged error, and should be regarded as a waiver of the right to do so.

The Commission and the courts have both condemned the practice by carriers of withholding their defenses until after the hearing before the Commission, and producing them subsequently at the hearing before the court.

Independent Ref. Ass. vs. Penna. R. Co.,
6 I. C. C. Rep., 52, 58.

Cincinnati etc. R. Co. vs. I. C. C., 162 U.
S., 196.

Rule of Practice, X.

E.

THE SUIT TO ENFORCE THE ORDER OF REPARATION, IF NOT COLLATERAL, IS A CONTINUATION OF THE PROCEEDINGS BEFORE THE COMMISSION, AND IF THE LATTER HAS ERRED IN ITS INTERPRETATION OF THE LAW, THE CASE SHOULD HAVE BEEN REMANDED BY THE COURT OF APPEALS TO THE COMMISSION, WITH INSTRUCTIONS TO PERFORM ITS DUTY IF IT HAD NOT ALREADY DONE SO.

The judgment of the Court of Appeals, in effect, requires the dismissal of the case, leaving the plaintiff without redress, as its claim would be barred by the

statute of limitations. We respectfully submit that such a judgment is without precedent in its injustice to a diligent and *bona fide* litigant. Granting that the order of reparation was voidable, or even void because the Commission neglected or failed to perform some administrative duty which the plaintiff was powerless to avoid, it surely cannot be true that such neglect or failure rendered all of the proceedings before the Commission void, and left the plaintiff without any redress.

Both the Supreme Court and the Commission have held that, under the act as it existed prior to the amendments of 1906, the suit to enforce an order of reparation was a continuation of the proceedings before the Commission, and that, when the court is of opinion that the Commission has erred in its interpretation of the law, the case should be remanded to the Commission for reconsideration under proper instructions.

Cattle Raisers Ass'n vs. C. B. & Q. R. Co.,
10 I. C. C. Rep., 83.

Texas & Pacific R. Co. vs. Interstate Com.
Com., 162 U. S., 167.

Louisville & Nashville R. Co. vs. Bohlmer,
175 U. S., 648.

Texas & Pacific Ry. Co. vs. Abilene Cotton
Oil Co., 204 U. S., 426.

The practice would, however, be much simplified, and the burden placed where it belongs, and where we believe it is placed by the Hepburn Act, if the order of reparation is regarded as a final adjudication by a court of competent jurisdiction, and not subject

to review in the suit to enforce the order in respect to any question except the question of damages. If the carrier is dissatisfied with the Commission's interpretation of the *law*, it should, as we have said, bring suit against the Commission and the shipper to enjoin and set aside the order of reparation.

F.

THE CASE SHOULD NOT NOW BE REMANDED TO THE COMMISSION BECAUSE ON SUBSEQUENT COMPLAINT BY PLAINTIFF THE RATE IN QUESTION WAS ESTABLISHED.

The act provides (sec. 14) that the published reports and decisions of the Commission shall be competent evidence of such reports and decisions in all courts of the United States, and of the several states, without any further proof or authentication thereof.

In accordance with the suggestion of the Commission in the case at bar, the plaintiff filed its petition before the Commission asking the establishment of a joint through route and rate. In that case the Commission prescribed a rate of 30 cents per 100 pounds as the maximum to be charged for the transportation of beer in carload lots from Pueblo to Leadville as part of a through transportation from St. Louis to Leadville.

Baer Bros. Mercantile Co. vs. The Missouri Pacific Ry. Co. and The Denver & Rio Grande Railroad Co., 17 I. C. C. Rep., 225.

Suit was brought by defendant to have said order set aside. Said suit was transferred to the United

States Commerce Court, and on April 15, 1912, the order was by that court sustained and the petition to annul the same was dismissed. No appeal having been taken, the order of the Commerce Court has become final.

The Denver & Rio Grande R. Co. vs. the
Interstate Commerce Commission,
195 Fed. Rep., 968.

We believe that the court should and will take judicial notice of these published reports and decisions, and, even in the event it finds that the Commission erred in ordering reparation without prescribing the rate for the future, the court will not do so vain a thing as to send the case back to the Commission with instructions to do what has manifestly already been done.

G.

THE FREIGHT CHARGES WERE PAID IN EACH AND EVERY INSTANCE UNDER PROTEST.

The Commission found that the freight charges on the first shipment were paid to defendant, and that the same were clearly paid under protest, and that the excess charges on this shipment amounted to \$45.14. The Commission also found that in all other cases the freight was paid by the Lemp Brewing Company, at the request of the plaintiff and on its account, to the Missouri Pacific Company at St. Louis, and was, by the instruction of the plaintiff, paid under protest, and that this fact was minuted upon the receipt given to the Lemp Company by the agent of the

Missouri Pacific at the time of the payment of the money and the execution of the receipt. The Commission also found that at some time prior to September 14, 1906, the plaintiff and also the Lemp Brewing Company, by the instruction of the plaintiff, notified both the Missouri Pacific Company and the defendant that the charges were considered unreasonable, and made claim for refund; that, after considerable correspondence, this claim was denied, and that plaintiff brought the suit which was dismissed (Rec., p. 71). The Commission held that, under the arrangement that existed between said carriers, the Missouri Pacific was the agent of the Denver & Rio Grande in receiving the prepaid charges, and that therefore the plaintiff did make each separate payment under protest (Rec., p. 81). There can be no doubt that this conclusion of the Commission is correct. When the shipment is a through shipment and the charge a through charge, it is the invariable practice of carriers to collect the total through rate either at the point of shipment or at the point of delivery, and to settle with each other for the charges so collected without any instructions from the consignor or consignee. When this has been done continuously for a period of years, as in this case, an agency to collect is, by implication at least, conclusively established. If under such circumstances the Missouri Pacific had failed to account to defendant for its share of any through rate so collected, it goes without saying that the plaintiff was under no further legal obligation to defendant on that account.

If, therefore, payment to the Missouri Pacific of the through rate was payment to defendant, then pay-

ment of the through rate under protest to the Missouri Pacific was payment under protest to defendant.

II.

IT WAS NOT NECESSARY THAT THE PAYMENT OF THE FREIGHT SHOULD HAVE BEEN MADE UNDER PROTEST.

It will be conceded that money voluntarily paid, with full knowledge of all the facts and without any sort of compulsion, cannot be recovered back, although no obligation to make such payment existed. If, however, money is paid under compulsion, no protest is necessary to lay the foundation of an action to recover the payment. The question to be determined, therefore, is whether or not the freight charges were paid under such compulsion as to render the payment involuntary. It will be conceded, no doubt, in this case that the plaintiff in fact had no alternative but to pay the through rate. All lines of railroad operating between St. Louis and Leadville maintained the same rates and charges during the time covered by the shipments in question (Rec., pp. 63-64). The plaintiff was compelled either to submit to the illegal exactions or discontinue its business. The record shows that between July, 1902, and March, 1907, the plaintiff never shipped less than 30,000, and sometimes 60,000, pounds of beer each month (Rec., pp. 15, 16, 17), showing that the business of plaintiff was of considerable magnitude, and that it could not be discontinued without great financial loss, and perhaps utter ruin.

It is well settled that payments to common carriers and others, compelled by business necessities, are so far compulsory as to be recoverable.

Robertson vs. Frank Bros. Co., 132 U. S., 17.

Swift & Co. vs. U. S., 111 U. S., 22.

Peters vs. Railroad, 51 Am. Rep., 816 and note.

The cases, both state and federal, are reviewed in *Peters vs. Railroad*, 51 Am. Rep., 816, and note, and the conclusion reached that, because the shipper did not stand on equal terms with the carrier, the rule under the common law was that the payment of excessive freight charges was not voluntary and protest was not necessary to lay the foundation of an action to recover them back. That protest is unnecessary, and payment of excessive rates does not preclude recovery on the ground that such payments are voluntary, is held in the following cases:

Ohio Coal Co. vs. Whitcomb, 123 Fed., 362-363.

Louisville & E. St. L. Con. R. Co. vs. Wilson, 132 Ind., 517.

Strough vs. New York Cen. & H. R. R. Co., 181 N. Y., 533.

Hilton Lumber Co. vs. Atlantic Coast Line R. Co., 53 S. E., 823.

Southern Pine Co. vs. Southern R. Co., 14 I. C. C. Rep., 195.

Nicola vs. Louisville & N. R. Co., 14 I. C. C. Rep., 199, 255.

The Act to Regulate Commerce itself makes the payment compulsory, and expressly gives the shipper the unconditional right to recover back the illegal charges.

I.

THE TRANSPORTATION IN QUESTION WAS INTER-STATE COMMERCE AND SUBJECT TO THE COMMERCE ACT AND TO THE JURISDICTION OF THE COMMISSION.

The jurisdictional facts stated by the Court of Appeals in its opinion (Rec., pp. 168-169) are sufficient to show that the traffic was carried by continuous movement from origin to destination without the intervention of the consignor or consignee, and, so far as they were concerned, the transportation was like that over a single line. It will be conceded that in control and management, and in fixing their respective local rates upon which these shipments moved, the Missouri Pacific and defendant were entirely independent of each other, and that there was no agreement or arrangement between them for through transportation from St. Louis to Leadville, except such as is indicated by, or may be implied from, the manner in which such business was handled and their mutual dealings with respect thereto.

The jurisdictional facts stated by the Court of Appeals in its opinion are, however, inaccurate in some particulars, and are not as full in others as the jurisdictional facts found by the Commission and included in its report (Rec., pp. 69-77); and inasmuch as these findings can only be rebutted or disproved, if at all, by preponderant and controlling evidence, and as there was no testimony before the trial court which

even tended to rebut them, we respectfully submit that this court should disregard the statement of such facts by the Court of Appeals, and in its consideration of this question be governed only by the facts found by the Commission.

The Commission found, as a conclusion of law, that by participating in the transportation of said beer from St. Louis to Leadville, The Denver & Rio Grande Railroad Company became subject to the Act to Regulate Commerce, and to the jurisdiction of the Commission with respect to such transportation, although its own service was performed entirely within the State of Colorado.

In the beginning of the administration of the law it was assumed, without question, that the qualifying words of section 1: "When both are used under a common control, management or arrangement for a continuous carriage or shipment," applied to connecting carriers *wholly by railroad*, as well as to carriers *partly by railroad and partly by water*. This construction of the first section was most unfortunate, and it has led to endless confusion and embarrassment in the administration of the law. If the qualifying words referred to had received a strict construction, the federal jurisdiction over interstate commerce would have been practically ousted and the act would have become a dead letter. To escape this result, the Commission and the courts held in effect that, when two or more connecting carriers are engaged in the transportation of property wholly by railroad from one state to another—or, in other words, are engaged in carrying interstate commerce—an arrangement to do so will be implied. The Hep-

burn Act, however, has punctuated the qualifying words in such manner that there can be no longer any doubt about their proper application. The first section of the act, as amended June 29, 1906, places in brackets the words "or partly by railroad and partly by water, when both are used under a common control, management or arrangement for continuous carriage or shipment." This deliberate punctuation must be regarded as a manifest limitation of the words "common control, management or arrangement" to carriers *partly by railroad and partly by water*. Thus understood, the act applies:

First—To any common carrier or carriers engaged in the transportation of property *wholly by railroad* from one state to another state.

Second—To any common carrier or carriers engaged in the transportation of property *partly by railroad and partly by water*, when both are used under a common control, management or arrangement for a continuous carriage or shipment from one state to another state.

So that, in the case of shipments by two or more connecting carriers wholly by railroad, the only jurisdictional fact to be established is the fact that the carriers were engaged in the transportation of property from one state to another state. The mere fact that the shipment is not to be continuous or on a through bill of lading, or even that the state carrier refuses to enter into any *arrangement* with its connections, can in no wise affect its character as interstate commerce if, in point of fact, its origin is in one state and its destination is in another state. The case of *The Daniel Ball*, 10 Wall., 557, is a leading

case on the definition of interstate commerce. In that case the court said:

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent to which each agency acts in that transportation it is subject to the regulation of commerce, and if the authority of congress does not extend to an agency in such commerce when that agency is confined within the limits of a single state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of the state and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted and the constitutional provision would become a dead letter."

It must be conceded that the Denver & Rio Grande Railroad, in receiving and carrying the cars of beer in question from Pueblo to Leadville, was engaged in interstate commerce. And if the act confers no jurisdiction on the Commission to regulate that commerce, then it is subject to neither state nor federal authority under existing laws, and the act is practically a failure. Before the jurisdiction of the

state attaches there must be actual or constructive delivery to the consignee. (Heyman vs. R. Co., 203 U. S., 270; Express Co. vs. Ky., 214 U. S., 218.) As a result of the erroneous assumption that the qualifying words of section 1 applied to all rail carriers, some of the inferior courts insisted upon interpreting those words so as to require proof of an actual arrangement between the carriers; but, as already stated, by the weight of authority, including the Commission and the Supreme Court of the United States, it was held that such an arrangement might be implied from a variety of circumstances. In fact, these decisions in effect hold that, if the carriers are engaged in carrying interstate commerce, they are subject to the act and to the jurisdiction of the Commission.

Board of Trade of Troy vs. Ala. Md. Ry.
Co., 6 I. C. C. Rep., 6, 7, 8.

Phillips & Co. vs. Troy & Pac. Ry. Co., 6
I. C. C. Rep., 48.

Cincinnati, N. O. & T. P. Ry. Co. vs. I. C.
C., 162 U. S., 184.

T & P. R. Co. vs. I. C. C., 162 U. S., 197.

Armour P. Co. vs. United States, 209 U.
S., 56.

United States vs. Seaboard Ry. Co., 82
Fed., 563.

Augusta So. R. Co. vs. Wrightsville, 74
Fed., 522.

United States vs. Penn. R. Co., 153 Fed.,
625.

Interstate Com. Com. vs. Chicago, R. I. &
Pac. Ry., 218 U. S., 88.

In *Board of Trade of Troy vs. Md. Ry. Co.*,
supra, the Commission said:

"The fact that a carrier's proportion of a through rate is its local for the haul over its own road or is a fixed amount, which remains the same for all points of origin or destination of traffic reached by the through line, cannot relieve it from joint responsibility as a component of the through line, if the entire rate be violative of the law. In the case of the *Georgia R. Com. vs. Clyde S.S. Co.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324, it is said: 'The total rate or charge for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority; how the rate or charge is made is only material as bearing upon the legality of the aggregate charge, and how any reduction ordered may be accomplished, whether by lowering locals or proportions, is matter for the carriers to determine among themselves;' and, again: 'Where two or more roads forming a continuous connecting line between points in different states bill and carry interstate traffic through to certain stations on the last road forming such line, neither the roads together nor any one of them can evade the obligations of the act to regulate commerce by declaring that as to such traffic it is a local carrier.' See, also, *James & Mayer*

Buggy Co. vs. Cincinnati, N. O. & T. Ry. Co., 3 Inters. Com. Rep., 682; 4 L. C. C. Rep., 744. Goods cease to be a part of the general mass of property in a state when they have been shipped or entered with a common carrier for transportation to another state. *Coe vs. Errol*, 116 U. S., 517; 29 L. Ed., 715; *Kidd vs. Pearson*, 128 U. S., 1; 32 L. Ed., 346. From that time until they reach their destination and 'become incorporated and mixed up with the mass of property' in the state where delivered, they are subjects of interstate commerce (*Leisy vs. Hardin*, 3 Inters. Com. Rep., 36; 135 U. S., 110; 34 L. Ed., 132), and the rates charged for their carriage are within the regulating power of this commission under the interstate commerce law. By section 7 of that law, it is made unlawful for carriers subject to that act 'to enter into any combination, contract or agreement, express or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intention to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.' The continuity of the haul is not broken in fact and can not be broken in law by one or more carriers, mem-

bers of a through line, charging local rates as their proportion of a through rate. If the continuity of the carriage may not be thus interrupted, can the exaction of local rates exempt the carrier from liability under the law by placing him in the attitude of a strictly local carrier, operating under no 'common control, management or arrangement' with the other carriers participating in the through haul? If this be conceded, the most vital provisions of the law may be readily evaded and nullified. For instance, a terminal carrier, part of a continuous through line, could elect to charge on through traffic its local to one or any number of stations on its road and a less through rate to stations beyond, and no violation of law could be alleged, because as to the short haul the carrier would not be subject to the act. *The charge of a local rate and declaration by a carrier that it is a local carrier can not alter the fact.* The law regards the substance of things, and a palpable device for evasion of the law will not be allowed to accomplish its purpose. The facts, that the carriage is continuous, that the traffic is through interstate traffic, and that the carrier in due and ordinary course of business accepts and forwards it, are sufficient to establish responsibility under the law."

In *Phillips & Co. vs. Texas & Pacific Ry. Co.*, *supra*, the Commission said:

"The defendant contends there was no common arrangement for continuous carriage or shipment between the boat line and the railroad carriers, and that, therefore, the steamboat transportation is not a proper subject for our consideration. But this commission has repeatedly held that the receipt, forwarding and delivery of traffic by connecting carriers clearly establishes the existence of a common arrangement between the carriers for continuous carriage or shipment. *Mattingly vs. Pennsylvania Co.*, 2 Inters. Com. Rep., 806; 3 I. C. C. Rep., 592; *Boston Fruit & P. Exch. vs. New York & N. E. R. Co.*, 3 Inters. Com. Rep., 493; I. C. C. Rep., 664; *James & M. Buggy Co. vs. Cincinnati, N. O. & T. P. R. Co.*, 3 Inters. Com. Rep., 682; 4 I. C. C. Rep., 744; *Trammell vs. Clyde S.S. Co.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324; *Board of Trade of Troy, Ala. vs. Alabama Midland R. Co.*, 6 I. C. C. Rep., 1."

The decision of the Commission in *James & Mayer Buggy Co. vs. Cincinnati, N. O. & T. P. Ry. Co.*, cited in the above cases, was affirmed by the Supreme Court in *Cincinnati, N. O. & T. P. Ry. Co.*, 162 U. S., 184. The facts in that case were briefly as follows: The Cincinnati, New Orleans & Texas Pacific Railway extended from Cincinnati to Chattanooga. The Western and Atlantic Railroad began at Chattanooga and extended to Atlanta. The Georgia Railroad began at Atlanta and ended at Augusta. There was a joint through rate from Cincinnati to Atlanta, which the first two roads named divided between themselves in

certain proportions, and there was a joint through rate from Cincinnati to Augusta, which was divided among the three roads in certain agreed proportions. When the goods were shipped to Social Circle, an intermediate station on the Georgia Railroad, there was added to the joint through rate to Atlanta the local charge made by the Georgia Company on similar freight carried by it from Atlanta to Social Circle, and in the division the Georgia Railroad received its regular local rate. The Georgia Railroad Company requested its connections not to name or fix any rate for that part of the transportation which took place in the State of Georgia when the goods were shipped to local points on its road. The contention was that, as the Georgia Railroad Company was a corporation of the State of Georgia, and as its road was wholly within that state, and as it was not a party to any through rate from Cincinnati to Social Circle, and as it exacted and received its regular local rate for the transportation to Social Circle, said company was not, as to the freight so carried, within the scope of the act of Congress.

There is a striking similarity between that case and the case at bar. The Georgia Railroad was not a party to the joint through rate to Atlanta, but its relation to that rate was the same as that of the Denver & Rio Grande Railroad to the rate from St. Louis to Pueblo. The Georgia road was a party to the through joint rate to Augusta. The Denver & Rio Grande is a party to the through rate to Salt Lake City. The Georgia road expressly requested its connections in issuing bills of lading not to insert any rate east of Atlanta to its local stations. In this respect that case was much stronger than the case at

bar. There is no evidence that the Denver & Rio Grande road ever objected to through bills of lading being issued, or that it ever made any request that it should not be done. It relies solely upon the fact that it had at all times exacted and received its local rate. In the Georgia Railroad case the Supreme Court said:

"We do not perceive that the Georgia Railroad Company escaped from the supervision of the commission by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the state of Georgia when the goods were shipped to local points on its road. *It still left its arrangement to stand with respect to its terminus to Augusta and other designated points. Having elected to enter into the carriage of interstate freights, and thus subjected itself to the control of the commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points.*"

The Denver & Rio Grande Railroad Company still left its arrangement to stand with respect to Salt Lake City, and, having thus elected to enter into the carriage of interstate traffic and subjected itself to the control of the Commission, it is not competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points.

The Supreme Court further said, in the Georgia Railroad case:

"All we wish to be understood to hold is that, when goods are shipped under a through bill of lading from a point in one state to a point in another, and when such goods are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. *When we speak of a 'through bill of lading,' we are referring to the usual method in use by connecting companies and must not be understood to imply that a common control, management or arrangement might not be otherwise manifested.*"

If, by adding the local rate from Atlanta to Social Circle to the through rate to Atlanta, and giving the Georgia road its local rate, there was a *conventional division of the charges*, then we submit that, by adding the local rate from Pueblo to Leadville to the rate from St. Louis to Pueblo, and giving the Denver & Rio Grande Railroad its local rate, there was also a conventional division of the charges. There can be no question, also, that the shipments of beer involved in this case were made on through bills of lading, or the equivalent of through bills of lading. (Rec., pp. 89-90.)

"A bill of lading is a written acknowledgment, signed by the carrier, that he has

received the goods therein described from the shipper to be transported on the terms therein expressed to the described place of destination, and there to be delivered to the consignee or parties therein designated."

5 Cyc. Law & Pro., 707.

"A bill of lading is the contract of the carrier to deliver the property to the person to whom the consignor or shipper shall order the delivery."

Merchants Bank vs. Hewitt, 3 Iowa, 93,
103.

The shipping receipts issued in this case contain all of the elements of a bill of lading. The articles of traffic are described, and its destination and the name of the consignee are distinctly made known. (Rec., pp. 89-90.)

No case has ever been decided by the Supreme Court in which an intrastate road has been held not subject to the act on the ground that it was not a party to a common arrangement with the connecting carriers. The case of the Gulf, Colorado & Santa Fe R. R. Co. vs. Texas, 204 U. S., 403, cited by the Court of Appeals (Rec., p. 169), does not involve this question; for there the circumstance which removed the traffic in question from the operation of the act was not the attitude of the intrastate railroad in refusing to form a continuous line with roads running to and from points outside of the state, but was the nature of the transaction between the consignor and consignee. The original consignment was from Hudson

or Kansas City, Missouri, to Texarkana, Texas, but the goods, having been sold in transit on arrival at Texarkana, were forwarded to Goldthwaite, Texas, on a new bill of lading by order of the consignee. It was held that the later shipment was not interstate commerce, and was properly subject to the control of the Texas statute. If a person in Philadelphia sells and ships goods to another in Pittsburg, the carriage of these goods is not interstate commerce, although the consignee all along intends to forward them immediately to points outside of Pennsylvania. When, however, the Philadelphia merchant sells goods to be delivered in Chicago, and ships them in accordance with this contract, every carrier hauling the freight for any part of the distance is necessarily engaged in interstate commerce and, by what is believed to be the proper construction of the act, is subject, as regards such traffic, to its provisions. (See Drinker on Interstate Commerce, Vol. 1, secs. 34-38.)

In *Denver & Rio Grande Railroad Co. vs. Interstate Commerce Commission*, 195 Fed., 568, hereinbefore referred to, the Commerce Court says, in its opinion affirming the order of the Commission establishing the rate:

"This suit was brought to set aside an order of the Interstate Commerce Commission, dated November 26, 1909, which in effect required petitioner, the Denver & Rio Grande Railroad Co., to reduce its rate on beer in carloads from Pueblo, Colo., to Leadville, Colo., when part of a through transportation from St. Louis, Mo., to Leadville.

from 45 cents to 30 cents per hundred pounds.

The principal ground upon which the order of the Commission is claimed to be invalid, and the only one that needs to be discussed, is that the order relates to the transportation of property received, handled, transported, and delivered wholly within one State, which is said to be not within the jurisdiction of the Commission because of the first proviso in section one of the act to regulate commerce. It is conceded that the transportation in question was interstate commerce, because the traffic was carried by continuous movement from a point in one State to a point in another State, and was therefore subject to the regulating power of Congress, but the contention is made that the proviso mentioned covers such transportation as is here involved, and therefore excludes it from the authority of the Commission."

The same admission and the same contention were made by counsel for defendant before the Court of Appeals in this case. They there say in their brief and argument:

"If it be urged that the shipments involved in this case originated at St. Louis, Missouri, and were ultimately carried to Leadville, in the state of Colorado, in the original package, and were therefore interstate commerce, *the fact may be admitted,*

But it is to be observed that the act to regulate commerce does not purport to cover all interstate traffic. * * *

On the contrary, the Act does expressly exclude certain interstate commerce. The first section of the Act, after specifying certain particular classes of commerce which are made subject to its provisions, uses the following express proviso:

‘PROVIDED, HOWEVER, that the provisions of this Act *shall not apply* to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property *wholly within one State*, and *not shipped* to or from a foreign country [or] from or to any State or Territory as aforesaid. * * *

We readily concede that a shipment from England or from Mexico to Leadville moving in an unbroken package, and received by the defendant at Pueblo and handled, transported and delivered by it wholly within the state of Colorado, is subject to the act to regulate commerce. We most respectfully and urgently contend, however, that a similar shipment from a point in the state of Missouri to Leadville, delivered to and received, handled, transported and delivered by this defendant wholly within the state of Colorado, is by the very letter of the statute exempted from its provisions.”

We do not believe that this contention was ever made in any case except in said case before the Com-

merce Court and in the case at bar, and the decisions in these cases are the only authorities on the subject. In addition to what is said by those learned tribunals, we suggest that the word "*or*" after the word "*country*" in said proviso, which we have interpolated, was a manifest omission which the court may supply to make the meaning of the proviso clear.

J.

THERE WAS NO EVIDENCE GIVEN OR OFFERED TENDING TO REBUT OR DISPROVE THE FINDINGS OF THE COMMISSION AS TO THE UNREASONABLENESS OF DEFENDANT'S RATE.

So far as the question of a reasonable rate may be determined by a comparison of rates, the Commission has selected for such comparison rates on the same commodities, moving from the same source, in the same volume, upon the same line of railroad, and its connections. The essence of the reasonableness of a particular fact is the comparison of that fact with a reasonable fact. The nearer identical the elements, the greater must be the weight of the evidence. In addition to the comparisons made by the Commission in its report—which was not necessarily all that was considered, but was sufficient to support its conclusion—the testimony before the trial court shows that the rate on beer in carloads from Denver to Grand Junction over defendant's line, a distance of 436 miles, was 55 cents, and the rate from Denver to Leadville over defendant's line, a distance of 270 miles, was 45 cents, and from Denver to Salt Lake

over defendant's road, a distance of 725 miles, was 50 cents.

The Commission's report shows that it had duly considered the question of the financial condition of the defendant, which the Supreme Court has said must be considered as the basis of calculation as to the reasonableness of railroad rates (*Smythe vs. Ames*, 169 U. S., 466), and found that there was nothing in its financial condition to justify the imposition of 45 cents for a haul of 160 miles.

No evidence was given or offered by the defendant even tending to rebut or disprove the findings of the Commission as to the reasonableness of the rate in controversy. The comparison of rates attempted to be made were over other roads between certain points in New Mexico, Texas, Wyoming and Arizona. The offer to prove these rates was properly rejected by the court. Except in one instance, the defendant made no offer to prove the physical conditions under which these roads were operated, and in no instance did it offer to prove the situation as to competition, or that those rates were part of a through rate; nor did it offer to prove the cost of operation and maintenance on those lines, or any other fact relating to their financial condition. Manifestly these offers were properly rejected, for the reason that, admitting all the facts which the defendant proposed to prove, to be true, they were clearly incompetent without evidence to show all of the conditions under which the alleged rates were made.

The testimony which was offered by the defendant relating to fifth-class rates, which included beer, on and prior to 1898, and relating to rates on coal, lime, rock, ore and bullion, in and out of Leadville,

as compared with rates on the same commodities in other places, was all clearly irrelevant and immaterial, and could not possibly have any bearing on the issue as to the reasonableness of the rate in question.

The testimony relating to the physical condition of the defendant's line of railroad between Pueblo and Leadville is of no consequence. It does not rebut or disprove any fact found by the Commission. On the contrary, the Commission has evidently considered the same evidence and given the defendant credit for all it claims in that respect. In its report the Commission says:

"The main line of the Denver & Rio Grande runs from Pueblo to Grand Junction, through a mountainous section. Its original construction was difficult and expensive, and its cost of operation high."

The defendant offered to prove by certain Denver brewers that in their opinion the rate on beer in car lots between Pueblo and Leadville was reasonable. This was not the question involved. The question was as to the reasonableness of that rate, not as a local rate, but as a part of a through rate. Besides, no foundation was laid or could be laid for such evidence, and it was clearly inadmissible on that ground. The defendant also offered to prove by certain Denver merchants the effect in their opinion of a reduction of the rate in question on the interests of Denver. The question of unreasonable disadvantage or prejudice to localities, under section 3 of the act, was not involved in the case. It was wholly immaterial whether the reduction of the rate affected Denver one

way or the other. This testimony was inadmissible on the further ground that no proper foundation was laid for the admission of the opinion of the witnesses.

The general auditor of the defendant corporation testified that there had been a general increase in the cost of labor and in the cost of ties, coal, shop material and lubricating oil; also, that the common and preferred stock was about equally divided, and that no dividend had ever been paid on the common stock, and not more than 5 per cent on the preferred stock.

Testimony relating to the financial condition of a carrier is required for the purpose of ascertaining whether it is operating at a loss, and, if so, to what extent; or at a profit, and, if so, to what extent. It is impossible to approximate from defendant's testimony what its gross and net earnings are or have been. The Commission, however, has considered the matter fully, and has told us what the facts are as to the financial condition of defendant, and in no particular have these facts been contradicted.

I submit that no evidence was given or offered by the defendant that tends to rebut or disprove the finding of the Commission, and that the plaintiff was entitled to judgment on the report without submission to the jury.

In *McGuire vs. Blount*, 199 U. S., 142, 148, the Supreme Court said:

"No rule is better established in this court than that which permits a presiding judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably

draw therefrom would be insufficient to support a different verdict. It is clear that when the court would be bound to set aside a verdict for want of testimony to support it, it may direct a verdict in the first instance and not await the enforcement of its views by granting a new trial."

Upon the whole record, therefore, and for the reasons assigned in the foregoing specifications of error and covered by the foregoing argument, we respectfully submit that the judgment of the Circuit Court of Appeals should be reversed, and that the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

WM. B. HARRISON,
Attorney for Plaintiff in Error.

IN SENATE
JANUARY 2, 1914
REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
MAY 1, 1912

RECEIVED
JAN 2 1914
LAND OFFICE
STATE OF NEW YORK

THE STATE OF NEW YORK
OFFICE OF THE COMMISSIONERS OF THE LAND OFFICE
ALBANY
JANUARY 2, 1914

TO THE SENATE
OF THE STATE OF NEW YORK

REPORT AND ARGUMENT IN BEHALF OF THE
DEFENDANT IN ERROR

JOHN F. WATTS
Counsel at Law of the Defendant and the
People of the State of New York
ALBANY
JANUARY 2, 1914

E. W. CLARK
J. O. McMAHON
Of Counsel



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In the Supreme Court of the United States

No. 893.

THE BAER BROS. MERCANTILE
COMPANY,

Plaintiff in Error.

v.

THE DENVER AND RIO GRANDE
RAILROAD COMPANY,

Defendant in Error.

*In Error to the
United States
Circuit Court of
Appeals for the
Eighth Circuit.*

BRIEF AND ARGUMENT IN BEHALF OF DEFENDANT IN ERROR.

On September 14, 1906, plaintiff in error filed an action in the United States Circuit Court for the District of Colorado to recover of defendant in error and The Missouri Pacific Railway Company the sum of \$6,331.08, damages alleged to have been sustained by plaintiff by reason of alleged overcharges collected by defendants for the transportation of certain shipments of bee, from St. Louis, Missouri, to Leadville, Colorado (folio 41).

On May 2, 1907, plaintiff dismissed said action of its own motion (folio 55).

On May 6, 1907, plaintiff brought a proceeding before the Interstate Commerce Commission against defendant in error and The Missouri Pacific Railway Company praying that the commission order the defendants to desist from the violation of the Interstate Commerce Act, and

“* * * that a further order be entered, fixing a reasonable and just rate for the through transportation of beer in carload lots from said city of St. Louis, to said city of Leadville, over said defendants' said lines of railroad, to be observed by said defendants as a maximum rate for such through transportation; that a further order be entered requiring the defendants jointly and severally as may be found just and proper, to pay to complainant the sum of seven thousand two hundred ninety-nine dollars and twenty-seven cents (\$7,299.27), as reparation for the damages sustained by complainant in consequence of the violations of the provisions of said act to regulate commerce.” (Fol. 11.)

On April 6, 1908, the Interstate Commerce Commission after hearing, made an order directing The Denver and Rio Grande Railroad Company to pay to plaintiff \$3,438.27 and interest from May 6, 1907. The order did not, however, fix a rate to be charged by defendants, or either of them, in future, for the transportation of beer from St. Louis, Missouri, to Leadville, Colorado, or over any part of the route between said points (folio 15.)

Defendant in error herein did not obey said order, and on June 26, 1908, plaintiff filed in the Circuit Court of the United States for the District of Colorado an action for the enforcement of the said order of the Commission, and prayed judgment against defendant in the sum of \$3,438.27, and interest, in accordance with the said order of the Commission (folios 1-15).

On November 30, 1908, judgment was rendered in said action, after verdict of the jury, in favor of plaintiff for \$3,761.45 and costs (folio 89).

On December 30, 1908, a writ of error was issued to the United States Circuit Court of Appeals for the Eighth Circuit (folio 526).

On May 18, 1911, the Court of Appeals reversed the judgment of the Circuit Court on the ground that the order of the Commission to enforce which the action was brought, having failed to prescribe the maximum rate to be charged by defendant in future, was void. The court said:

"An order of reparation without such an establishment of a reasonable maximum rate is beyond the power of the Commission and void, and as no such rate was prescribed and no order forbidding the future use of an excessive rate was made in the case in hand, the Commission's order of reparation in this case was beyond its power and void" (Record pages 165-172).

On July 11, 1911, a petition for rehearing was filed by plaintiff (Record page 173).

On October 9, 1911, an order was entered by the Circuit Court of Appeals modifying the judgment of the Circuit Court, and denying the petition for rehearing (Record page 175).

On November 17, 1911, petition for writ of error from the judgment of the Court of Appeals was filed in the Supreme Court of the United States and was allowed (Record pages 175-181).

This statement and the statement of the case made by plaintiff in the brief heretofore filed, will acquaint the court with the essentials of this proceeding.

This case presents two distinct phases which must be discussed separately.

ASSUMING THAT THE INTERSTATE COMMERCE COMMISSION HAD JURISDICTION OVER THE SHIPMENTS IN QUESTION AND OVER THE RATES APPLIED TO THOSE SHIPMENTS, THE COMMISSION COULD NOT EXERCISE ITS POWERS AND PERFORM ITS DUTIES IN RESPECT THERE-TO EXCEPT IN STRICT CONFORMITY WITH THE STATUTES.

Laying aside the assumption, however, and considering the case as it was originally presented, the other phase may be thus stated.

THE INTERSTATE COMMERCE COMMISSION HAD NO JURISDICTION OVER THE SHIPMENTS IN QUESTION OR THE RATES APPLIED THERETO, AND WAS WITHOUT POWER TO AWARD REPARATION OR FIX MAXIMUM RATES OR TAKE ANY ACTION OTHER THAN TO DISMISS THE COMPLAINT.

It would perhaps be more logical to consider these phases in the reverse order, but plaintiff has considered them in the order above stated.

The points designated in plaintiff's brief, A. B. C. D. E. F. G and H, are based upon the assumption that the Commission had jurisdiction, while the point desig-

nated I deals with the question of whether or not the Commission had such jurisdiction. It will be perhaps more convenient, therefore, to follow this order of discussion in this reply brief. It must be distinctly understood, whether stated in each subdivision of the argument or not, that the concession that the Commission had jurisdiction generally over the shipments and the rates involved, and the concession that the Commission had jurisdiction over the rate of the Denver and Rio Grande applicable from Pueblo to Leadville, and had the power to deal with that rate apart from a through or joint rate from St. Louis, are concessions made solely for the purposes of the argument and not otherwise.

The proposition first to be considered may be stated thus:

I. ASSUMING THAT THE INTERSTATE COMMERCE COMMISSION HAD JURISDICTION OVER THE MATTERS IN CONTROVERSY, DID THE COMMISSION COMPLY WITH THE STATUTES IN MAKING THE ORDER WHICH THE COURT IS NOW ASKED TO ENFORCE?

The main question presented is, whether or not the order of the Commission requiring defendant to make reparation to plaintiff, without fixing the maximum rate to be charged in future, is a valid order. In discussing this question, the arguments made by plaintiff in error may be followed as set forth in the brief.

Plaintiff contends:

"A. The Court of Appeals erred in holding that the rate charged and collected by defendant was lawfully established as an interstate rate" (Brief page 22).

The Court of Appeals holds:

"* * * that in a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier *at the lawfully established* rate has been excessive, because the rate was unreasonable, the finding and prescription by the Commission of a reasonable maximum rate to be observed * * * are conditions precedent to the exercise of its power to order reparation." (P. 172.)

It is assumed by plaintiff that the principles announced by the court are confined to cases in which the rate in question *was a lawfully established interstate rate*, and that if in this case the rate was not a lawfully established interstate rate, the principles would not apply.

The suggestion that the rate of the defendant charged for transportation of beer from Pueblo to Leadville was not an established rate arises from the fact that defendant in this case, as well as in other cases, contended that the rate was a purely local intrastate rate and therefore not subject to the Interstate Commerce Commission. From which it is argued that a rate does not become established although filed, when jurisdiction is denied. (Record, page 43, brief page 923).

Plaintiff insists in argument that the rate in question was "* * * never published or filed *as an interstate rate or as any part of an interstate rate*" (brief page 23). That defendant in filing the rate in question had no "intention" of complying with the law (Brief page 24). The implication is that before a rate can be lawfully established it must be "intentionally filed as such," and must be conceded and declared to be an inter-

state rate or a part of such rate by the carrier filing the same.

The opinion of the Court of Appeals contains no discussion, limitation, or intimation as to what may constitute an established rate. It refers to “* * * a lawfully established rate,” and leaves the question open as to what constitutes such established rate. The first inquiry is, whether or not the rate complained of was an established rate.

1. THE RATE IN QUESTION WAS AN ESTABLISHED RATE.

Section 6 of the act of March 2, 1889, as amended and superceded by the act of June 29, 1906, the law in effect when said rates were filed in 1907 (Record pages 116, 117), provides:

“That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation.”

It appears that no through rate had been established from St. Louis to Leadville for the transportation of beer. The provision of the statute, therefore, relating to filing rates by a carrier for its portion of the route over which an interstate shipment passes applies to this case, but there is nothing in this statute that requires the carrier under such circumstances to designate the rate so filed as an interstate rate or part of an interstate rate. Nor is there anything in the statute requiring the carrier filing such rate to hold in mind any specific intention with reference to such filing. There is nothing that requires the carrier to intend to comply with the law, or to concede jurisdiction of the Commission, or to entertain any view or purpose with respect to the act performed. The fact of the filing is all that is required. If the rate be one which the statute does not require to be filed, the filing has no effect; if it is such an one as the law requires to be filed, the act of filing satisfies the demand of the law. If the rate is one over which the law gives the Commission no jurisdiction, the filing can confer no jurisdiction, for the reason that jurisdiction cannot be conferred by consent. On the other hand, if the rate is one over which the law gives the Commission jurisdiction, filing the rate with a mental protest or denial of the jurisdiction of the Commission would not take away or effect the jurisdiction conferred upon the Commission by the statute. Plaintiff says:

“It would have been an idiotic performance for the defendant to take up the time of the Commission and the trial court to prove that it was not engaged in interstate commerce, if it had voluntarily submitted itself to the jurisdiction of the Commission by filing and publish-

ing the rate as required by the Act" (Brief page 12).

And again:

"* * * in justice to the defendant it must be conceded that it has never so stultified itself as to contend directly or indirectly that its compliance with the said request (of the Commission to file the rate) had any such effect, or that the rate in question was ever in any way or at any time established as an interstate rate." (Brief page 24.)

Defendant must decline to be saved by plaintiff from the imputation of stupidity, and must admit that it did file the rate with the Commission, and did assert, and did believe when it did so, that the Commission had no jurisdiction over the rate. It filed the rate because it knew that if the Commission had no jurisdiction, the filing would confer none, and if the Commission had jurisdiction, the physical act of filing would protect defendant against the penalty the law imposed for not filing.

The record shows that the rate was filed by defendant (folios 58 and 463), and this rate had been applied to beer shipments of the character involved in this case since about 1898 (page 168). Defendant having complied with the law, the rate became the established rate, as declared by the Court of Appeals, assuming, of course, that the rate was one which the law required the defendant to file. Plaintiff has always contended that the rate was an interstate rate, and was subject to the jurisdiction of the Interstate Commerce Commission.

2. IT IS IMMATERIAL IN THIS CASE WHETHER THE RATE HAD BEEN ESTABLISHED OR NOT.

If it be assumed that the holding that the rate complained of was an established rate, was erroneous, it is not apparent what detrimental effect that holding would have upon the plaintiff's rights in this case.

It is suggested that if the rate had not been established at the time the case was determined the jurisdiction of a court to give judgment for damages would not be ousted by the act of June 29, 1906, and acts of which that is amendatory and supplemental; that a court has jurisdiction to award damages for the collection of an unjust rate, whenever the rate complained of has not been established, and since the court has no power to make an order fixing a rate for the future, it follows that in cases where the rate has not been established, it is possible, through a court, to obtain a judgment for damages without prescribing a maximum rate to be charged in future. From this it is argued that if *the court* has jurisdiction in such case to award damages without such an order, *the Commission* would have like power. Therefore, in all cases where the rate has not been established, the Commission may award reparation without making an order establishing a maximum rate to be charged in future.

These arguments are not stated consecutively in the brief, but they are the essence of the contentions contained in various parts of the brief.

At the top of page 23 the following statement is made:

"The court apparently concedes that the prescription of a rate for the future is not a prerequisite to a shippers' right to recover

damages for excessive charges when the rate complained of is not established."

This suggestion evidently originated in Texas and Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426:

Page 428 counsel argued:

"No cause of action for damages or otherwise will lie against a carrier for collecting its duly published, filed and posted rates. If this rate be unreasonable, the only remedies the shipper has are those provided in Section 9 of the Interstate Commerce Act."

At page 434 this court said:

"Second, it is urged that the effect of the act to regulate commerce upon the right of the Oil Company to recover need not be passed upon, since, even if error on that subject was committed below, a review of the decision in that regard is unnecessary, because if the correct legal inference be drawn from the facts found by the trial court, which were adopted by the appellate court, it will result that the railway company had not established a legal schedule of rates in compliance with the act to regulate commerce, and therefore the jurisdiction of the court and its right to afford relief was not at all effected by the provisions of the act."

This is a statement of the point upon which plaintiff apparently relies in this case, but this Court did not determine that the point was well taken. This Court continues on page 434:

"We do not presently stop to consider whether the consequences as to jurisdiction and right to recover which are asserted would result, if the premise was well founded, because we think the premise is either shown by the findings to be unfounded or it is not open for contention on the record."

The distinction which plaintiff pretends to draw between cases before the Commission, where the rate complained of is an established rate, and instances where the rate complained of is not an established rate, has never been accepted by any court, and apparently has never been stated except in the case above cited, and it clearly appears in that case that this court was not favorably impressed with the proposition. In order to obtain and preserve the uniformity which the Interstate Commerce act is intended to secure, it is just as essential that where an unestablished rate is found to be unreasonable a maximum shall be prescribed, as where an established rate is found too be unreasonable the maximum to be applied in future shall be established.

The argument of plaintiff, however, seems to be that the Court of Appeals found the rate of which complaint was made was an established rate, in order to lay that fact as a predicate for the conclusion that the Commission could not award reparation without fixing the maximum to be charged where the Commission found under Section 15 of the Interstate Commerce act:

"* * * that * * * the rates or charges * * * are unjust or unreasonable."

Section 15 of the act of June 29, 1906, declares:

“That the Commission is authorized and empowered and *it shall be its duty* whenever after full hearing upon a complaint made as provided in Section 13 of this act * * * the Commission shall be of the opinion that any rates or charges * * * demanded * * * are unjust or unreasonable * * * to determine and prescribe what will be the just and reasonable rate or rates * * * to be thereafter observed in such case as the maximum to be charged.”

It will be observed that this statute makes no distinction between an established rate and a rate that has not been established.

The language of the opinion of the Court of Appeals does not indicate that the establishment or non-establishment of the rate is in any respect a controlling factor.

At page 169 of the record, the court said:

“The rate which the Denver and Rio Grande Company charged and collected was a lawfully established rate. It had been in force for more than eight years when the complaint before the Commission was filed. If as that Commission found, it was unreasonable, no one could determine how unreasonable it was, unless that body determined what a reasonable maximum rate would be and prohibited a rate in excess thereof.”

There is nothing in this to indicate that the fact the rate was an established one formed a basis for any part of the conclusion.

At page 171 the Court said:

"The original act of 1887 did not impose the duty upon the Commission upon a complaint for reparation on account of the unreasonableness of an established rate to determine what should be the reasonable maximum rate to be observed in future, and to make an order prohibiting the use of a higher rate," etc.

The use of the term "established rate" in this connection indicates nothing as to its being an essential or a non-essential element of the opinion.

At page 172 the court said:

"And the conclusion is that in a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully established rate has been excessive because that rate was unreasonable, the finding and prescription by the Commission of a reasonable maximum rate to be observed by all, and an order by the Commission prohibiting the use of a rate in excess thereof, are conditions precedent to the exercise of its power to order reparation."

This is a statement that where an established rate is found to be unreasonable the Commission must establish a maximum rate before it can award reparation, but it does not follow from this statement that the Commission can find an unestablished rate to be unreasonable and award reparation without fixing the maximum for the future.

Plaintiff says in further argument of this point that the fixing of a rate for the future cannot be a condition precedent to granting reparation where the rate complained of is not an established rate: else Section 9 of the act giving courts concurrent jurisdiction with the Commission becomes a dead letter. Section 9 gives certain courts and the Commission concurrent jurisdiction, and it is argued that if it be held that the fixing of a maximum rate is a condition precedent in all cases to the power of awarding reparation, and it is held as it was in the Abilene case, *supra*, that the Commission alone could fix a rate, it follows that no court could award reparation, and therefore the jurisdiction of the court is destroyed; therefore, Section 9 of the statute becomes inoperative.

This Court has effectively disposed of this argument at page 442 of the Abilene case:

"In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission."

The jurisdiction of the court is not to be maintained at the expense of the scheme of legislation.

When the rate is not an established one, a court has jurisdiction to award reparation. The Commission has also jurisdiction to award reparation. The court and the Commission, therefore, have concurrent jurisdiction

of the question of reparation or damages. In such a case the court has no power to fix rates and cannot therefore prescribe the maximum rate to be charged in future. On the other hand, the Commission has such power, and the statute makes it the duty of the Commission to fix the rate. The Commission cannot, therefore, award reparation without fixing the maximum for the future. The court and the Commission have concurrent jurisdiction so far as reparation is concerned, but the Commission having the larger power and greater duty must go further than the court and prescribe the maximum rate, but this in no way destroys the concurrent jurisdiction of the court and the Commission as provided in Section 9.

In *Langdon et al. v. Pennsylvania R. Co.*, 186 Fed. 237, decided 1911, at page 240, the court said:

"The original jurisdiction of the Federal court under section 9 has not been entirely destroyed, but it still may redress 'such wrongs as can, consistently with the context of the act, be redressed by the courts without previous action by the commission,' and, whenever a complainant comes into the courts to redress a wrong which he alleges has resulted from some discriminatory act of the common carrier, it will always be necessary in the first instance to can be redressed by the courts."

So long as the carrier fails to establish the rate, the court may find the rate unreasonable under the common law, and may give judgment for damages without reference to the statute. But when the rate has been established, the court cannot find it unreasonable, and if the court should award damages, it, in effect, orders the

carrier to deviate from the established rate, which would be a violation of the law requiring a carrier to adhere to the established rate. This matter was considered in the Abilene case, at 335, and it will be noted that this Court distinctly declined to accept plaintiff's view.

But if the question that the rate attacked in this case was or was not an established rate were important or controlling, plaintiff is not in position to urge the point upon this Court at this time.

3. PLAINTIFF IS ESTOPPED TO DENY IN THIS COURT THAT THE RATE WAS ESTABLISHED.

Plaintiff brought an action in the Circuit Court of the United States for the District of Colorado, on September 14, 1906 (fol. 41), in which it is alleged (fol. 43):

"VI. That on the dates hereinafter mentioned the defendants above named *established and published* a joint tariff of rates or charges for the transportation of beer in carloads over their said lines of railroad from the said City of St. Louis to said City of Leadville."

The date referred to was the 12th of July, 1902. At fol. 48 of the record, the following appears:

"And plaintiff avers that the said rates or charges *established* and demanded by the defendants and paid by the plaintiff for the transportation of said beer from the said City of St. Louis to the said City of Leadville, aforesaid
* * *"

Again, at fol. 49, the following appears:

"That on the dates hereinafter mentioned, the defendants above named *established and*

published a joint tariff of rates or charges for the transportation of beer in carloads over their said lines of railroad from the said City of St. Louis to said City of Leadville."

Again at fol. 53:

"Plaintiff avers that said rates or charges *established* and demanded by defendants."

Plaintiff at this time was proceeding upon the theory that the rate of which complaint was made was established.

It appears that plaintiff voluntarily dismissed this case, and plaintiff sets out the circumstances of the dismissal, saying, in part:

"* * * and having concluded that under said decision the court had no jurisdiction of the causes of action, stated in its said amended complaint, * * * the petitioner asked the court to dismiss said amended complaint at its cost" (fol. 82).

In the action brought by plaintiff to enforce the order of the Commission, and especially in the replication to the answer, plaintiff refers to the rate in question as the rate "* * * so established and published" (fol. 81). At the trial of that action, plaintiff brought out the following:

"Q. Mr. Lampton, is it not a fact that The Denver and Rio Grande Railroad Company has filed with the Interstate Commerce Commission its local rate from Pueblo to Leadville on beer? A. Yes, sir.

"Q. When did it do that? A. Why, my recollection is it was either in the spring of 1907 or fall of 1907, I am not certain which; it was after the Commission had requested that all local rates be filed with it" (folio 463).

The Court of Appeals found upon the record that:

"The local rate of 45 cents per cwt. in carload lots from Pueblo to Leadville was in force from 1898 until after 1907, and in that year, after the Interstate Commerce Commission had requested that all local rates should be filed, the Denver and Rio Grande Company filed that rate with the Commission" (Record, page 168).

Plaintiff has proceeded upon the theory that the rate in question was an established rate, has referred to it as such, and has brought out testimony tending to show the filing of the rate, and has sought to have defendant admit that the rate was not only filed but was an interstate rate. In the brief before the Court of Appeals, plaintiff says at page 29:

"Section 6 (of the Act of Congress of March 2, 1889, as amended and superseded by the Act of June 29, 1906), provides that if no joint rate over the through route has been established the several carriers in such through route shall file with the Commission and keep open to public inspection the separately established rates, fares and charges applied to the through transportation. A fine of from one to twenty thousand dollars is imposed by the first section of the Elkin Act for failure to com-

ply with the above named provision of Section 6. *The Denver and Rio Grande complied with Section six*, not, they say, to avoid the penalty, but to oblige the Commission."

It is evident that plaintiff alleged the filing of this rate, and insisted upon showing that the rate was filed, and based its case partly upon the alleged admission that the rate was an interstate rate when defendant filed the rate with the Commission. Having taken this position plaintiff cannot now, in this court, take the contrary position.

In the Abilene case, at page 434, it appears:

"Although it is conceded that the evidence showed that the schedule of rates was established and filed with the Interstate Commerce Commission and was kept at the stations of the railway company for public inspection, and that the oil company had knowledge of the fact, it is insisted that the facts found do not justify the conclusion that there was a compliance with the requirements of the act to regulate commerce as to the posting of the established schedule. We think this contention is not open on this record. As we have seen, the trial court expressly concluded that the railway company had complied with the act to regulate commerce in the matter of filing, etc., its schedule of rates, and the appellate court opened its opinion by the statement that the course of the trial and the briefs of counsel confined the issue for determination to the question of the effect of the act to regulate commerce upon the rights of the parties, manifestly upon the assumption that the

correctness of the conclusion of the trial court as to compliance with the act was conceded by both parties. In other words, as the court below in deciding the case expressly declared that the course of the argument and briefs of counsel before it had confined the case to the issue of whether there was a right to recover upon the hypothesis that a schedule of rates had been filed and published, we do not think that it is now open to contend that that which the court below in effect declared was conceded in the briefs of counsel to be a lawful schedule of rates was not such. *Non constat*, that if the Court of Civil Appeals, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule and affirmatively found facts inevitably compelling the conclusion that the act to regulate commerce had been fully complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted. Because we thus find the question not open for consideration we must not be considered as conceding the correctness of the conclusions attempted to be drawn from the supposed failure to post."

The first point made in plaintiff's brief may be dismissed with the summary: that the rate in question was filed with the Commission, and became the established rate; that the validity of the judgment of the Circuit Court of Appeals does not depend upon whether the rate was an established rate or not, it never having been held

that the Commission has the right to award reparation without establishing a maximum rate in any case where the rate attacked *had not been established*, but would not have the right to award such reparation without the establishment of a maximum rate in future in any case where the rate attacked *had been established*; that the only effect of the establishment of the rate is to deprive the court of jurisdiction to deal with a case brought to recover damages on account of unreasonableness of such rate; that if this rate were not an established rate, and if that fact were a controlling consideration in this case, plaintiff is not in position to urge that point upon this court, having in this proceeding taken the position that the rate was an established rate.

Plaintiff next contends:

“B. The Court of Appeals erred in holding that the establishment of a maximum rate to be observed by defendant in future was under any circumstances a necessary prerequisite to the validity of the order of reparation” (page 20).

In support of this proposition plaintiff devotes twenty pages of the brief, relying upon four subheads. The argument, however, may be reduced to one thought—that it is impractical to make the power of the Commission to grant reparation dependent upon the power and duty of the Commission in the particular case to make an order prescribing a maximum rate to be charged by the carrier in future. The essence of plaintiff's criticism of the judgment and opinion of the Court of Appeals is that the opinion presents a theory of legislation that cannot be put into practice, and, therefore, not the theory intended by Congress in the enactment of the

statute. It becomes necessary, therefore, to analyze the statute and to show that its provisions, as interpreted by the Court of Appeals, are capable of enforcement and that they will work no injustice or hardship, but, on the contrary, will accomplish the main purpose for which this legislation was intended—the securing of uniform rates for the carrying of passengers and property by common carriers.

The following considerations show the purpose of the statute and the manner in which it will operate if reasonably interpreted by the court and faithfully administered by the Commission.

4. AT THE TIME THE COMPLAINT WAS FILED WITH THE INTERSTATE COMMERCE COMMISSION THE LAW REQUIRED THE COMMISSION TO PRESCRIBE THE MAXIMUM RATE TO BE APPLIED IN FUTURE.

Prior to the Hepburn Act, which was approved June 29, 1906, the Commission had (1) no power to order reparation, and (2) no power to fix a rate or a maximum. Section 14 of the act of 1889, provided that the Commission should, after hearing, make its report “* * * with its *recommendation* as to what reparation, if any, should be made by the common carrier to any party * * *.”

The Hepburn Act provides that if the Commission shall determine that any party is entitled to reparation it “* * * shall make an order directing the carrier to pay * * *.”

The very statute which gave the Commission the power to make an order of reparation and to make a finding upon which the order should be based, and made the order *prima facie* evidence of the truth of the facts

found, gave also the right and power to the Commission to prescribe a maximum rate.

Not only did the Hepburn Act confer the *power* upon the Commission, but it *imposed the duty* upon the Commission to make the order of reparation—" * * * the Commission shall make an order directing the carrier to pay * * *." It also imposed the duty upon the Commission to prescribe the maximum rate for the future—" * * * it shall be its duty * * * to determine and prescribe what will be the just and reasonable rate * * * to be thereafter observed * * *."

It is significant that the enlarged power of the Commission in respect to reparation was conferred coincident with the enlarged power and declared duty of the Commission to prescribe maximum rates. The duty of the Commission in respect to fixing a maximum rate for the future is contained in section 4 of the Hepburn Act, amending section 15 of the prior Act; and the duty of the Commission to make an order for reparation is contained in section 5 of the Hepburn Act amending section 16 of the prior Act.

The duty to fix the maximum rate is " * * * after full hearing upon a complaint made as provided in section 13 of the Act;" and the duty to make an order of reparation is " * * * after hearing on a complaint made as prescribed by section 13 of the Act."

It is significant that both duties grow out of one hearing on the one complaint. The hearing referred to in section 13 is a hearing upon the complaint of any person injured or claiming to be injured by the failure of the carrier to comply with the Act.

The duty to fix the maximum rate arises whenever the Commission " * * * shall be of the opinion that any of the rates * * * are unjust or unreasonable

* * *." The duty to make the order of reparation arises whenever "* * * the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of the Act for a violation thereof * * *."

Section 1 of the Act provides that all charges for any service rendered or to be rendered "* * * shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *." It is evident, therefore, that if the Commission finds a rate unreasonable, it becomes its duty to do two things: (1st) to order the carrier to cease charging the rate, and in future to desist from charging a rate in excess of a maximum fixed by the Commission; and (2nd) to order the carrier to pay to the complainant reparation on account of the excessive rate. There is but one hearing, and there is the finding of but one condition—that the rate is unreasonable. That the rate is unreasonable is the very condition upon which the Commission must prescribe the maximum rate. The unreasonableness of the rate is the violation of the Act which makes it the duty of the Commission to award reparation. The Commission cannot find the rate unreasonable without finding that there is a reasonable rate, and without prescribing that reasonable rate for the future. Nor can the Commission find the rate to be unreasonable and refuse to give reparation to a claimant who has suffered damages on account of the collection of the unreasonable rate. The finding of unreasonableness of the rate is, therefore, the condition upon which the duty of the Commission rests to fix the rate and the duty to award reparation. From this examination of the provisions of the Act it is evident that it was the

purpose of Congress to place upon the Commission two concurrent duties and this is apparent upon the face of the statute without looking into the general purpose of the law.

5. THE PURPOSE AND PLAN OF INTERSTATE COMMERCE LEGISLATION CANNOT BE ACCOMPLISHED WITHOUT IMPOSING UPON THE COMMISSION THE PRIMARY DUTY OF FIXING THE MAXIMUM RATE.

The primary purpose of the interstate commerce acts is to secure reasonable freight rates and uniformity of practice, accommodation and service among common carriers. The abuses which led to the enactment of these statutes were discrimination, preferences, rebates and unreasonable rates. Congress undertook to remedy these abuses by vesting in the Commission power to fix rates and to prevent discrimination, and rebates or other preferences. Each successive piece of legislation by Congress has been directed to the accomplishment of that end. It was not the primary notion back of this legislation that each person who had suffered from unreasonable rates or from discriminations should be repaid the loss. The right of such persons to receive compensation for damages suffered was recognized, but that right was not made the main object of the legislation; the right to reparation was only an incident to the main purpose. The legislation has been progressive. It started with the idea of making rates reasonable and non-preferential; and the Commission only had power to recommend reparation. When finally the Commission was given the absolute power to fix rates, there was a corresponding increase in its power in respect to reparation; and it was then authorized, and it was made its duty, to issue an order for reparation. Its power to recommend or

issue an order for reparation has always been based upon the finding that the rate was unreasonable. Search will be made in vain for an adjudicated case in which the Commission has made an order of reparation without finding the reasonable rate and prescribing it, and it has been pointed out that to allow the Commission to award reparation without ordering a maximum rate for the future would leave the carrier without guide. To avoid such confusion, it was made the duty of the Commission to prescribe the maximum rate and thus prescribe the standard by which future claims of reparation arising under the particular tariff and in respect to the same commodity, should be measured; uniformity is thus secured.

Feigned fear expressed by plaintiff in this case that the doctrine of the Court of Appeals may result in great embarrassment to the Interstate Commerce Commission does not merit serious consideration. It is said that the Commission may find that a claimant is entitled to reparation but may not be willing to establish a maximum rate for the future. The claimant is therefore deprived of reparation because the Commission cannot or will not establish the maximum rate, and is therefore deprived of his constitutional right, and the statute becomes invalid and unconstitutional. The statute says, as has been pointed out already, that wherever the Commission is convinced, in a hearing, that a rate is unreasonable, it is the duty of the Commission to fix the reasonable rate, and it is upon exactly the same finding of unreasonableness that the reparation is based. If there is difficulty in this matter, it is not in the interpretation of this statute. It is in the fact that Congress has not legislated wisely; that is a matter for Congress, not the court, to correct.

6. THERE IS NOTHING IN THE ACT THAT REQUIRES THAT THE MAXIMUM TO BE ESTABLISHED BY THE COMMISSION FOR THE FUTURE SHALL COINCIDE WITH THE REASONABLE RATE FOUND FOR THE PURPOSE OF REPARATION.

Section 15 of the statute says that when the Commission, after hearing, shall be of the opinion that the rates are unjust, the Commission shall determine and prescribe "what will be the just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged." Section 16 with reference to reparation provides that if after such hearing the Commission shall determine "* * * * that any party complainant who is entitled to an award of damages under the provisions of this Act for violation thereof, the Commission shall make an order directing the carrier to pay the complainant the sum to which he is entitled." It will be observed that there is no necessary relation as to amount between the reasonable rate ascertained for the purpose of determining the award of damages, and the just and reasonable rate to be prescribed by the Commission as the maximum to be charged in future. To illustrate: A charge may have been made for a certain shipment amounting to \$1.25. The Commission may be of the opinion that the rate was excessive to the amount of 25 cents and may award reparation for that amount. It may not be of the opinion, however, that it would be fair to establish a rate of \$1.00 as a maximum for the future, but that a \$1.10 would be fair. There is nothing in the statute that prevents the Commission from establishing a maximum of \$1.10 for the future, and making an order of reparation on the

basis of \$1.00. The entire purpose of the statute being to secure uniformity and to prevent uncertainty, the prescription of a rate for the future would be just as effective whether the rate fixed coincided with the reasonable rate found for the purpose of reparation or not.

Reparation on shipments moving prior to the establishment of a maximum rate are not necessarily on the same basis. The establishment of a maximum for the future is not retroactive. Such rate does not apply to any shipment moving prior to the date upon which the maximum is established. Claims for reparation arising before the date upon which the maximum is established must be disposed of upon the facts presented in each case separately, and the amounts awarded depend upon facts in evidence, and will vary with those facts being greater or less as the evidence may justify. The Commission has held that the mere fact that the Commission has awarded reparation upon a certain shipment is not conclusive that the Commission would make a similar or any reparation upon the movement of the same kind of freight over the same route at another time. To require that the maximum rate for the future shall coincide with the rate found reasonable, for the purpose of awarding reparation upon a shipment which moved prior to the fixing of the maximum, would, in fact, make the maximum rate retroactive from the date upon which the shipment upon which reparation is awarded moved up to the time of the hearing. This would necessitate that all reparations on shipments moving between the date of the shipment upon which reparation is awarded and the date of fixing the maximum rate shall be absolutely uniform, and would destroy the power of the Commission to award in each case what in its judgment were the damages suffered.

7. THE COMMISSION COULD NOT HAVE BEEN EMBARRASSED IN THIS CASE IN PRESCRIBING A MAXIMUM RATE FOR THE FUTURE.

Plaintiff argues that to compel the Commission to prescribe the maximum rate for the future as a condition precedent to awarding reparation in a specific case, may embarrass the Commission where the Commission is of the opinion that the rate charged was unreasonably high at the time the shipment moved, but that at the time the case is heard and the order entered, it is not necessary or desirable to establish that rate as a maximum for the future. It is urged that conditions may have so changed since the shipment moved that the rate which was reasonable at that time would not be reasonable as a maximum for future charges. In the thousands of cases heard by the Commission not one case, so far as the reports show, has presented this condition. The proposition is highly speculative; possible but improbable. It certainly cannot be argued that any such situation is presented in this case. The defendant charged for the carrying of beer from Pueblo to Leadville 45 cents a hundred. The Commission found:

"In our opinion, 30 cents per hundred pounds, in carloads, from Pueblo to Leadville, is sufficient as applied to this movement. It must be borne in mind that this is part of a through haul and that the charge for this portion might well be less than would be reasonable for purely local service over the same distance.

"We find, therefore, that the Denver and Rio Grande has exacted from the complainant charges in excess of what would be just and

reasonable by the amount of 15 cents per hundred pounds" (fol. 115).

Here is a complete finding that 45 cents per hundred is excessive, and that 30 cents is sufficient, and that 45 cents was excessive at the time the shipment moved, and that 30 cents was sufficient. In other words, the Commission finds that the conditions that effected the reasonableness of the rate on beer moving from Pueblo to Leadville were the same at the time the case was heard that they were at the time the shipments took place. There is no doubt on the part of the Commission as to what was, at the time the opinion was rendered, a reasonable rate. There was no reason, therefore, why the Commission could not and ought not to have established the reasonable maximum for the future.

The Commission found every condition required by the statute to be found for the establishment of a maximum rate for the future as well as for the payment of reparation. The rate was found to be unreasonable, and the extent of unreasonableness was ascertained. It was therefore perfectly easy and perfectly proper, and in fact, it became the duty of the Commission to establish the maximum rate for the future and to award reparation. Why did the Commission not establish the maximum rate for the future? The report contains the following:

"There has been no practical difficulty in making these shipments over this route in the past. If the Denver and Rio Grande does not reduce its charge in accordance with this report, or if suitable through facilities are denied, the complainant can file its petition asking the establishment of a joint through route and rate" (fol. 120).

Why the Commission thus avoided the establishment of the rate is not apparent. The complaint in this case prayed that the Commission fix “* * * a just rate for the through transportation of beer in carload lots from the City of St. Louis to said City of Leadville” (fol. 120). The Commission simply said if the defendant does not establish the rate, you can come back and we will establish it. It is a plain violation of duty on the part of the Commission. The language of the statute has been quoted which shows that the Commission had not merely the right and power but that it was its positive duty to establish the rate under the circumstances. It appears, therefore, that whatever embarrassment or difficulty might arise in some other imaginary case, no such condition was presented in the case now before the court. And it was pointed out in the preceding argument that even if a case should arise in which the Commission is unwilling to establish the maximum rate for the future, at the same amount as the reasonable rate for the purpose of awarding reparation, there is nothing in the statute requiring that the maximum rate for the future shall be identical with the reasonable rate upon which the reparation in the specific case was based.

Plaintiff further argues that the interpretation of this statute by the Court of Appeals renders the statute unconstitutional, for the reason that it prevents plaintiff from recovering damages due. It may be doubted that this argument is serious. Plaintiff had admitted, and it is true whether admitted or not, that the courts have jurisdiction to award damages in any case where the Commission has not established a rate. The power and authority of the court to deal with unreasonable rates, where the Commission's power has not been invoked, has

never been questioned. Plaintiff in this case brought a suit to recover damages at common law. When the opinion was rendered in the Abilene case, holding that the courts have no jurisdiction to award damages in respect to any rate that had been established by the Commission, or under the rule of the Commission, plaintiff dismissed its case. Plaintiff

“* * * having concluded that under said decision the court had no jurisdiction of the causes of action, stated in its said amended complaint, and for the purpose of having it appear of record that there was no ruling on said demurrer and no decision on the merits of the case, petitioner asked the court to dismiss said amended complaint at its cost, without prejudice to the right of petitioner to again institute its suit upon the same cause of action in any court of competent jurisdiction, and the order of dismissal was so entered of record” (folio 82).

Plaintiff having thus dismissed the case admitted that the rate in this case was an established rate within the meaning of the Abilene decision. Plaintiff therefore was relegated to the Interstate Commerce Commission for redress and promptly availed itself of that course. It has not been questioned by plaintiff or any one else that the Interstate Commerce Commission has full power in the proceeding brought to award reparation which may be due. There is no claim that the amount awarded in this case was not full compensation. The suggestion that the Commission was prevented from awarding reparation in the case because required to fix a maximum rate for the future is effectually disposed of by the argu-

ment that the Commission can in any case fix a maximum for the future and is not required to fix such maximum at the same rate found to be reasonable for the purpose of reparation. The embarrassments which plaintiff has introduced into this case entirely disappear when this view of the statute is taken.

Following the general argument that it is impractical for the Commission to establish a maximum rate as a condition precedent to awarding reparation, plaintiff says at page 46 of the brief:

"C. It was not competent, under the act and under the complaint before the Commission, for that body to establish the local rate of the defendant to be applied to the through transportation in future."

This will be recognized as a part of the general argument that the theory adopted by the Court of Appeals renders reparation under the Interstate Commerce act impracticable, because cases may be presented in which reparation ought to be awarded, but in which there is no basis for the establishment of a maximum rate, and in which the Commission is not bound to establish such rate, and perhaps ought not to establish such rate. It is urged that such instance is presented in this case because the rate attacked was only the Denver and Rio Grande rate from Pueblo to Leadville—a local rate which the Commission could not affect by an order. The Commission was powerless to establish a local rate, but could only establish a through or joint rate and allow the carriers to apportion the rate among themselves, if they failed to apportion the rate or to agree upon an apportionment, the Commission would then fix the divisions.

This is the view taken by the defendant which has

at all times contended that the Commission must deal with the rate as a whole. There is no suggestion in this case that the Commission could not have dealt with the rate from St. Louis to Leadville as a whole. There was never in this case the slightest reason for saying that the Commission could not establish a through rate on such basis as to make the total charge reasonable. The fact that it was conceded that the rate up to Pueblo was reasonable, and the further fact that the Commission found that the excessive rate existed between Pueblo and Leadville in no way militated against the Commission dealing with the rate as a whole. And no necessity appears for dealing with the Pueblo-Leadville rate separate from the entire rate.

Plaintiff conceded that the rate from St. Louis to Pueblo was a reasonable rate (fol. 107), and made the same concession in the brief at page 50, and the Commission did not question this concession. Its finding was confined, as is claimed, to the Denver and Rio Grande local rate. But it must be borne in mind that it appeared throughout the case that it was never denied that this local rate was the rate applied by the defendant to shipments of beer originating at St. Louis and destined to Leadville; that this was the identical rate that the carriers used in the transportation of that commodity, and it has been held that the Commission has power to fix the local rate under those conditions.

In *Denver & R. G. R. Co. v. Interstate Commerce Commission*, 195 Fed. 968, at 973 and 974, the court says:

“The sixth section of the act recognizes three kinds of classes of rates, namely, the rates between different points on each carrier’s

line, the joint rates of two or more carriers when they have established through routes and joint rates, and the 'separately established rates' applied by a carrier on through traffic when there is a through route but no joint rate. This rate in question from Pueblo to Leadville seems to us clearly of the latter class. It is the rate which petitioner provided for through transportation, and it was that rate, provided and used for that purpose, of which complaint was made as resulting in an excessive through charge, and which the Commission by its order reduced. The circumstance that it was the same in amount as the purely local rate of petitioner between the same points does not alter its character as a separately established rate applicable to through shipments. In our opinion both the carrier and the traffic were within the terms of the act, and the Commission had full jurisdiction to make the order in question. See *Interstate Commerce Commission v. Chicago, R. I. & Pac. Ry.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 946, where the Supreme Court sustained an order of the Commission which reduced the local rates of certain carriers between the Mississippi and Missouri rivers when applied to through traffic from Eastern territory."

Plaintiff, although contending that the Commission had no power to fix a maximum rate in this case, because the rate found to be unreasonable was a local rate, points with triumph to the fact that the Commission did establish the rate in another case (brief, page 60), cit-

ing Baer Bros. Mercantile Co. v. Missouri Pacific and Denver and Rio Grande, 17 I. C. R. 225, and the opinion of the U. S. Commerce Court in Denver and Rio Grande Co. v. Interstate Commerce Commission, 195 Fed. 968, and says that this court should and will take judicial notice of these reports and decisions, and will ascertain therefrom that the Commission established as a maximum rate the 30-cent rate from Pueblo to Leadville, and says that since that rate was subsequently established, that it is not necessary for this court to further consider this phase of the case.

The inconsistency of plaintiff's position is manifest. It is contended:

First: The Commission had no power to fix the local rate.

Second: The Commission did fix the local rate in another case and therefore there is no necessity for now fixing the rate in this case.

Plaintiff contends in one breath that the Commission cannot fix the local rate, and in the next breath seeks to take advantage of the fact that the Commission did attempt to fix the local rate. Defendant's position is that the Commission had full power to fix the through rate, but had no power to fix the local rate, and that even if the Commission did attempt in another case to fix the local rate, this court is without judicial knowledge of that fact, and even if this court had knowledge of the fact, this court is powerless to excuse the Commission from its failure to prescribe a maximum rate in the case now before the court.

It cannot be conceded that this court can or ought to take judicial knowledge or give any force to a case not brought to this court in the record presented.

In *Robinson v. Baltimore and Ohio R. R. Co.*, 222 U. S. 506, at 511, this court said:

"The next question to be considered is, whether judicial notice should have been taken of the decision of the Commission in *Glade Coal Co. v. Baltimore & Ohio Railroad Co.*, wherein, as it is said, the rate here in question was found to be unjustly discriminatory and the railroad company was directed to desist from its enforcement. The decision was rendered April 28, 1904, and authoritatively published in 10 I. C. C. 226, but was not mentioned in the pleadings or in the agreed statement of facts. In the Supreme Court of Appeals of the state it was contended that the decision should have been judicially noticed by the trial court, but the contention was rejected, and that ruling is now challenged as contravening the provision in section 14 of the act (25 Stat. 855) which reads: 'The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several states, without any further proof or authentication thereof.'

"Undoubtedly, this provision makes the decisions of the Commission, as so published, admissible in evidence without other proof of their genuineness, but it does not require that they be judicially noticed, or relieve litigants

from offering them in evidence as they would any other competent evidence intended to be relied upon. Its purpose is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions by authorizing the use of the published copies, but it does not otherwise change the rules of evidence. The ruling, therefore, was not in contravention of the statute.

"The result, however, would have been the same had the decision been properly before the court. An examination of it discloses that it did not contain any finding or direction as to what, if any, reparation should be made because of prior exactions of the rate which it condemned. It did find that the complaining party in that proceeding had been injured by the refusal of the railroad company to furnish cars on certain occasions for the shipment of coal, and did direct that reparation therefor be made, but that is without bearing here."

But if this Court should feel justified in referring to the report of the Interstate Commerce Commission as contained in 17 I. C. C. R. 225, it would find that the rate fixed was the 30-cent rate from Pueblo to Leadville—the identical rate which the Commission refused to fix in the case now before the court; and it would also find that the Commission fixed that rate upon the record in the case now before this court, which record was presented to the Commission in lieu of new evidence in the case reported in 17 I. C. C. R. 225. The Commission has not been guilty of any inconsistency in refusing to establish this rate in the case now before the

court, and then subsequently establishing it upon the same record in the case above referred to. The Commission did not, in the case now before the court, hold that it had *no power* under the circumstances to fix the rate prayed for. If it had held that it had no power, then the fixing of that rate by the Commission in the subsequent case would have presented an inconsistency. The Commission seems to have assumed in both cases that it had the power to fix the rate under the circumstances presented in evidence. The mistake committed by the Commission was that it did not realize that it was its imperative duty to fix the rate in the case now before the court, conceding, for the purpose of argument, that it had the power to do so. The argument presented by plaintiff that the Commission had no power to fix the maximum rate in the case now before the court, has never had the sanction of the Commission nor of the Court of Appeals, and that position has been distinctly contradicted by the Commission in its establishment of the rate in the subsequent case and by the Commerce Court in the above citation. The contention of defendant as to the power of the Commission to fix the local rate is discussed hereafter in this brief.

It would not be profitable to follow further plaintiff's argument that the Commission could not make the rate it was asked to make, nor is it necessary to consider further the suggestion that the rate was subsequently established, of which fact this court has no legal knowledge nor means of acquiring knowledge, the record in this case being entirely silent on that point.

Following the suggestion that the rate having been established subsequently, plaintiff says it would be folly now for this court to send this case back for the establishment of the rate, and it would be manifestly unfair

to the plaintiff to dismiss this case without giving some opportunity to rectify the mistake of the Commission, and therefore this court should do whatever is necessary to make the order of reparation valid and afford plaintiff reparation.

These arguments are contained in the brief under "D," "E" and "F" (pages 51, 58 and 60). Aside from the argument just presented, that this court is without legal knowledge or means of knowledge, of the fact that the Commission did subsequently establish the rate, it is submitted that this court is without power to overlook the failure of the Commission to establish the maximum rate, and can do nothing to make this order of the Commission a valid one. Upon a suit to enforce an order of the Commission, the court is without power to revise or supplement the order or to overlook the deficiencies in the order.

In *Southern Pacific Co. v. Colorado Fuel and Iron Co. et al*, 101 Fed. 779, the court was called upon to enforce an order of the Commission in which certain rates had been prescribed, and referring to the power of the Commission to fix rates and the power of the court to correct an order of the Commission in respect to fixing rates, the court said at page 786:

"It may well be that the Interstate Commerce Act would be much more effectual in accomplishing the objects which it was designed to accomplish if the Commission provided for therein was empowered to prescribe a schedule of maximum rates in cases like the one in hand. But that power, it seems, has not been conferred, and the courts cannot enlarge the authority of the Commission by enforcing orders of that body which it has no power to make. Neither

can the court undertake to name a maximum rate in advance, and enjoin a carrier from violating it."

This decision was rendered in 1900 before the enactment of the Hepburn bill which gave the Commission power to fix rates, and presents the contrary of the proposition here presented. In that case the Commission undertook to fix rates when it had no power to do so. The court was asked to correct the order which it refused to do. In the case now before this court, it was the duty of the Commission to fix the rate. The Commission failed to do so and this court is asked to excuse the Commission from this breach of duty. This court is as powerless to excuse the Commission from making the maximum rate as it was in that case to empower the Commission to make the maximum rate.

In *Southern Pacific Co. v. Interstate Commerce Commission*, 200 U. S. 536, at 551, Mr. Justice Peckham said:

"By section 16 of the Act, the Circuit Court is given authority to enforce 'any lawful order or requirement of the Commission.' If the order be not a lawful one, the court is without power to enforce it. Whether or not such order was lawful is the matter to be determined."

The contention of defendant in the case now before the court is that the order awarding the reparation is unlawful because it does not fix the maximum rate to be charged in future. This case is authority for the proposition that this court has jurisdiction to determine whether the order is or is not lawful. If it is an un-

* lawful order, there is no authority vested in the court to so modify it as to make it lawful.

In *Interstate Commerce Commission v. Illinois Central Railroad Co.*, 215 U. S. 452, this court said at page 470:

"The statute endowing the Commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject.

"Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c), a proposition which we state independently, although in its essence it may be contained in the previous one, viz, whether, even although the order be in form within the delegated power, nevertheless, it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * The power to make the order and not the mere expediency or wisdom of having made it, is the question."

In *Baltimore & Ohio R. R. Co. v. U. S. ex rel. Pitcairn Coal Co.*, 215 U. S. 481, at 494 this court said, referring to *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 205 U. S. 426:

"The ruling there made dealt with the provisions of the Act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the Act by that ruling, since, by section 15, as enacted by the amendment of June 29, 1906, the Commission is empowered, *indeed it is made a duty*, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference, or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the Commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action. In considering section 15 in the case of *Interstate Commerce Commission v. Illinois Central R. R. Co.*, just decided, ante 452, it was pointed out that the effect of the section was to cause it to come to pass that courts in determining whether an order of the Commission should be suspended or enjoined were without power to invade the administrative functions vested in the Commission and therefore could not set aside an order duly made on a mere exercise of judgment as to its mere wisdom or expediency. Under

these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene case that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce."

In *Interstate Commerce Commission v. Lake Shore et al. Co.*, 134 Fed. 942, decided in 1905, at page 947, the court said:

"It has been frequently decided in the Federal courts that, under the act, the function of the court is to enforce or refuse to enforce, the order of the commission as made; that the court cannot amend or modify an order, or make another order; that the Federal court has no revisory power over the orders of the commission; and that it cannot undertake to decide whether the respondents have violated an order which the commission might lawfully have made."

The above case was affirmed in 202 U. S. 613.

In *Philadelphia & R. Ry. Co. et al. v. Interstate Commerce Commission*, 174 Fed. 687, decided in 1909, at page 689, the court said:

"It is therefore apparent that, when the question of suspending or setting aside an executive act comes before a court under such statute, the question is one of law, namely, whether the executive transcended its power or exercised such power without due regard to law."

These authorities are conclusive that both before and after the passage of the Hepburn Act the courts had jurisdiction to determine whether or not an order is within the power of the Commission, and further whether the facts upon which the order is based are sufficient to sustain the order, and that the courts had no other jurisdiction. It is manifest, therefore, that the suggestions of the plaintiff that this court should consider certain alleged facts and certain alleged subsequent acts of the Commission, and that if in the light of such facts this court should believe that in the application of some rules of equity the plaintiff should be given reparation, this court should ignore the plain provisions of the statute and should take such action in reference to this matter as may render it effective for the purpose of securing the reparation, is a wholly untenable theory.

This discussion demonstrates that even if the general jurisdiction of the Commission over the matters involved were admitted, the Commission has not complied with the details prescribed by the statute, and the order which this court is asked to enforce is wholly invalid.

But resuming the discussion and now denying what has heretofore been conceded, defendant's proposition may be stated as follows:

II. THE INTERSTATE COMMERCE COMMISSION HAD NO JURISDICTION OVER THE RATE OF THE DENVER AND RIO GRANDE RAILROAD COMPANY APPLICABLE FROM PUEBLO TO LEADVILLE UNDER CIRCUMSTANCES DETAILED IN EVIDENCE.

I. THE SHIPMENTS IN QUESTION, SO FAR AS THEY MOVED OVER THE RAILROAD OF DEFENDANT, WERE NOT WITHIN THE INTERSTATE COMMERCE ACT.

The opinion of the Court of Appeals at page 167 of the record says:

“This judgment is assailed on the grounds; (1) that the transportation by the Denver and Ro Grande Company from Pueblo to Leadville was wholly within a single state, was not under any through joint rate, and was of property not shipped to or from a foreign country, from or to any state or territory so that it was beyond the control, and the claim for reparation was without the jurisdiction of the In-

terstate Commerce Commission. 34 Stat., chap. 3591, sec. 1, page 584.”

The court further said on the same page:

“These facts were conclusively established at the trial: There never was any joint through rate for the transportation of beer from St. Louis to Leadville over the Missouri Pacific Railway and the Denver and Rio Grande Railroad, and there never was any convention or any division of any joint through rate for such transportation between the companies owning these railroads. Each company maintained during all the transportation in question its lawfully established and independent local rate over its own railroad and the beer moved at the sum of these local rates. Each shipment was accompanied with an order delivered to the Missouri Pacific Railway Company by the

Lemp Brewing Company at St. Louis to send the beer to the Baer Company at Leadville via the Denver and Rio Grande Railroad Company, and the Missouri Pacific Company gave a receipt which described each shipment and acknowledged its receipt "in good order from William J. Lemp Brewing Company, by Missouri Pacific Railroad Company. To be delivered to the Baer Bros. Mercantile Company at Leadville, Colorado, via D. & R. G.' No bill-of-lading was ever issued. Each shipment was waybilled to Pueblo at the Missouri Pacific local rate because that company had no through rate or billing arrangements thereon at Pueblo. Each shipment was delivered by the Missouri Pacific Company to the Denver and Rio Grande Railroad Company with a transfer sheet or expense bill, which described the shipment and disclosed the freight charges of the Missouri Pacific Company, or contained the statement that they were paid, the origin and destination of the shipment, the consignor and the consignee. The Denver and Rio Grande Company received the shipment at Pueblo and billed it from that city to Leadville over its railroad at its local rate of 45 cents per cwt., naming therein the Missouri Pacific Company as the consignor and the Baer Company as the consignee. The transfer sheet and the waybill conveyed the same information that would have been conveyed had the shipment been made by any other party at Pueblo from that city to Leadville. The local rate of 45 cents per cwt. in carload lots from Pueblo to Leadville

was in force from 1898 until after 1907, and in that year, after the Interstate Commerce Commission had requested that all local rates should be filed, the Denver and Rio Grande Company filed that rate with the Commission. When the first shipment of the beer was delivered to the Denver and Rio Grande at Pueblo, it paid the Missouri Pacific its charges thereon at its published rate, and after its arrival at Leadville, and after the Baer Company had received and unloaded it, the Baer Company paid the sum of the charges of both companies to the Denver and Rio Grande Company and protested that those charges were excessive. The Lemp Company paid the charges of both railroad companies to the Missouri Pacific on all the subsequent shipments of the beer throughout the five years some days after the shipments were respectively made, wrote across the bills it paid the words, 'Paid under protest,' and the Missouri Pacific Company paid to the Denver and Rio Grande Company the latter's charges upon these shipments at its local rate of 45 cents per cwt, for carload lots.

"Upon this state of facts counsel for the Denver and Rio Grande Company insist that the reasonableness of the rate of that company upon beer from Pueblo to Leadville was not within the jurisdiction of the Interstate Commerce Commission because the transportation the railroad company conducted was wholly within the state of Colorado on independent contracts made by itself to carry this beer on its

railroad at its local rate, because there never was any through joint rate for its transportation from St. Louis to Leadville or any conventional or other division of such a rate between the railroad companies, or any through bill of lading, because the Missouri Pacific Company never contracted and never had any authority from the Denver and Rio Grande Company to contract to transport beer from Pueblo to Leadville over the railroad of the latter, and the only contract of the Missouri Pacific Company was to carry it from St. Louis to Pueblo over its railroad at its local rate and to deliver it to the Denver and Rio Grande Company at that place, and the Missouri Pacific Company was a forwarder at Pueblo and not a contractor for the transportation of the beer over the railroad of the Denver and Rio Grande Company."

Defendant submits that this statement is an accurate presentation of the facts, but plaintiff, at page 65 of the brief, criticizes the statement and prefers the statement made by the Commission, as shown in the record, at pages 69 to 77. An examination of that statement will reveal the fact that there is no conflict between the two statements, and the defendant is content to have this court consider both statements.

The Court of Appeals, in passing upon this proposition, said at page 169 of the record:

"This contention is not without great persuasive force," and cited certain cases and concluded:

"* * * but it is unnecessary to a disposition of this case to determine the question

it presents and without intimation that the contention is either sound or unsound, the question is passed without decision."

This question, avoided by the Court of Appeals, was subsequently presented to the Commerce Court in *D. & R. G. v. Interstate Commerce Commission*, 195 Fed. 568, and an opinion adverse to the contentions of the defendant was rendered. This, however, does not deter defendant from presenting to this court the point, sustained by arguments believed to be cogent and conclusive.

In order that the position of the defendant may be clearly understood, it is conceded at the outset that under section 8, Article I, of the Federal Constitution, commonly called the "Commerce Clause," Congress has power to confer upon the Interstate Commerce Commission, or any tribunal created by law, jurisdiction in respect to traffic originating in one state and destined to points in another state, and to clothe said Commission or other tribunal with authority to enter an order as to such traffic, such as the one here assailed. In other words, it is admitted that traffic which originates in one state destined to points in another state is interstate traffic, or "commerce * * * among the several states," as that term is employed in said section 8.

The contention is that Congress has not conferred such jurisdiction nor clothed the Interstate Commerce Commission with such authority, but, on the contrary, has expressly withheld both.

Said Mr. Justice Miller, speaking for the court in the case of *The Floyd Acceptances*, 74 U. S. 666, 676, 677:

"We have no officers in this government, from the president down to the most subordinate agent, who does not hold office under the law with prescribed duties and limited authority."

He further said that the power of all officers
"is delegated and is defined by law, constitutional or statutory;"

and, in order to determine their authority,

"we must resort in every instance * * *
to one or both of these sources."

Looking, then, to the Interstate Commerce Act (as it existed at the time the shipment involved were made and at the time the order complained of was entered), to which the Interstate Commerce Commission owes its existence, which defines its powers, and under which it exercises whatever authority it has, it appears that the act *does not purport to cover all interstate traffic*. On the contrary, the act expressly excludes certain interstate commerce. The first section, after specifying certain particular classes of commerce which are made subject to its provisions, uses the following express proviso:

"Provided, however, That the provisions of this act *shall not apply* to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property *wholly within one state*, and *not* shipped to or from a *foreign country* from or to any state or territory as aforesaid."

It is important to observe that the Act to Regulate Commerce, in defining the traffic intended to be affected, does not use the words "interstate commerce." It carefully avoids them.

So far as material to the present discussion, the act expressly applies to *carriers* engaged in the transportation of property—

(a) From *one state* of territory to *any other* state or territory;

(b) From any place in the United States to an adjacent *foreign country*.

(c) From any place in the United States through a foreign country to any other place in the United States;

(d) From any place in the United States to a *foreign country*, and thence to a port of transshipment;

(e) From a *foreign country* to any place in the United States, and carried to such place from a port of entry in the United States or an adjacent foreign country.

Then follows the limiting proviso already quoted in this argument. This proviso must be construed in the light of the language immediately preceding it.

As the affirmative provisions of the act above mentioned do not in terms apply to the *traffic* carried, but are directed to the *carriers* engaged in transporting the traffic described, it might be argued that a proviso was necessary to exclude from the scope of the act the strictly local (non-interstate) traffic of such carriers. Such a contention as to the purpose of this proviso might be plausibly urged if the last eighteen words thereof were eliminated. It might then be dubiously contended that transportation "*wholly within one state*" referred to cases where the *entire* move-

ment of the article from the place of primary origin to that of ultimate destination was *wholly* within one state. But the final words of the proviso absolutely preclude that construction. These words clearly show that, within the meaning of the law, articles shipped from a foreign country to "*any* state or territory" may, by a carrier described in the act, be in fact transported *wholly within one state*, and yet such shipment of foreign origin or destination is not excluded from the act, even though the carrier's transportation thereof is wholly within one state. The conclusion is inevitable that the proviso is not confined to strictly local—i. e., wholly intra-state—traffic.

Now, if a shipment from a *foreign country* to any state or territory may, by a given carrier, be in fact transported "*wholly within one state*," as that expression is used in the proviso, then clearly a shipment from any state to another state or territory may, by a particular carrier, be in fact transported or handled wholly within one state.

It was competent for Congress to have expanded the last clause of the proviso, so that the same should read "and not shipped to or from a foreign country from or to any state or territory, or from one state or territory to another state or territory;" but Congress did not so provide, and we have a case for the inexorable application of the rule, "*Expressio unius exclusio alterius*," especially in view of the affirmative provisions of the act preceding this proviso; also of the acknowledged rule of construction, "that the exceptions from a power mark its extent."

See: *Gibbons v. Ogden*, 9 Wheaton, 22 U. S., 1, 190.

A shipment from England, or from Mexico to Leadville, moving in an unbroken package, and received by the defendant at Pueblo, and handled, transported and delivered by it wholly within the State of Colorado, is subject to the Act to Regulate Commerce. But a similar shipment from a point in the State of Missouri to Leadville, delivered to, and received, handled, transported and delivered by, defendant, wholly within the State of Colorado, is, by the very letter of the statute, exempted from its provisions. It is respectfully submitted that the language of the proviso or excluding clause in the act is so explicit as to leave no ambiguity as to its meaning, and that, if it be true that the relation of a given carrier to a given shipment is such that its reception, handling, storage, transportation and delivery are wholly within one state, such shipment not coming from a foreign country, there is no room for contention that such shipment is subject to the jurisdiction of the Interstate Commerce Commission by virtue of any provision of the Act to Regulate Commerce, from which, and from which alone, the Interstate Commerce Commission derives its authority with respect to, and jurisdiction and control over, traffic. The proviso quoted applies not only to shipments whose origin and destination are both in the same state, but to *all* shipments transported by a single carrier or several *carriers wholly within a single state*, and not shipped to or from a *foreign country*.

It appears manifest that this conclusion must be the correct one. It is clearly apparent that if the proviso related only to the transportation of property, or of property transported wholly within a single state, it would have been wholly unnecessary. Congress had not, and has not, authority to legislate with reference

to transportation beginning and ending within, and wholly confined to, the limits of a single state, and its authority extends, under the constitution, only to "commerce with foreign nations, and among the several states, and with the Indian tribes;" one is not authorized to impute to Congress an intention to declare by this proviso merely that it was not overstepping the constitutional limitations upon its legislative authority.

The power of a state to regulate commerce within its boundaries is plenary. Such power was in no wise surrendered to the general government by the Federal Constitution. Upon this point Chief Justice Marshall said in *Gibbons v. Ogden* (9 Wheat.), 22 U. S., 1, 195:

"The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."

This state power has never been seriously questioned, except where it has been made to appear that the laws of the state, "or the orders of its commissions relating to its intra-state commerce which, by the necessary or natural or probable operation, have the effect substantially to burden interstate commerce."

The correlative of "not shipped to or from a foreign country" is "shipped to or from a foreign country," and the complement of both expressions is "shipped to or from another State or Territory or the District of Columbia." In other words, the carrier engaged in the transportation of property moving from one state or territory to another state or territory is subject to the act as to "transportation of passengers or property" subject to the act, but it need not so conduct all such transportation as to subject all transportation to the operation of the act. As to transportation conducted by a carrier wholly within a single state, it cannot avoid the operation and application of the act, provided that the property transported has its origin or destination in a foreign country.

It will be observed that the language of the proviso referred to is exceedingly broad:

"PROVIDED, HOWEVER, That the provisions of this act shall not apply," etc.

This means, and can only mean, that none of the provisions of the act shall apply to transportation of property wholly within one state, unless and except the property transported is shipped to or from a foreign country, unless and except the particular carrier involved in any part of the transportation of a shipment "from one state or territory of the United States, or the District of Columbia, to any other state or territory," shall actually transport across the state line, or shall, by the voluntary establishment of joint through routes, and publication and filing of inter-state tariffs in relation thereto, concur in such tariffs filed by some other carrier.

The attention of the court is invited to the decision of the Supreme Court of the United States in the case of Gulf, Colorado and Santa Fe R. Co. v. Texas, 204 U. S., 403, in which the opinion was written by Mr. Justice Brewer.

In that case the shipment involved was apparently covered by a bill of lading from Hudson, South Dakota, to Texarkana, Texas, issued by the initial carrier. The shipment was also carried from Texarkana, Texas, to Goldthwaite, Texas, on a bill of lading issued at Texarkana and covering the transportation from that point to Goldthwaite. In the matter of the issuance of bills of lading that case differs from the case at bar, but it will be particularly noted that in the case at bar the Missouri Pacific Company had no authority whatsoever from this petitioner, or by virtue of any established through route or joint rate, or by virtue of any contract between the shipper or consignee and this petitioner, to issue a bill of lading through to Leadville. It did not do so, and, as has been held by the Supreme Court of the United States in several cases, the shipper is conclusively bound by the lawfully published rates of the carriers.

See Texas and Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426.

Mr. Justice Brewer, in the case of Gulf, Colorado and Santa Fe R. Co. v. Texas, *supra*, said:

"It is undoubtedly true that the character of shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the con-

tract of shipment. The rights and obligations of carriers and shippers are reciprocal.”

What was the contract of shipment entered into between the Brewing Company, which delivered the shipments involved in this case to the initial carrier, and the Missouri Pacific Company, to which it delivered the shipments in the manner hereinbefore referred to? Clearly not that the Missouri Pacific Company should transport the shipments to Leadville—for it could not do so—but to perform its common-law duties in respect thereto as a common carrier, and to transport it in the direction of its ultimate destination to the terminus of its own line, and there to deliver the shipments over to a connecting carrier for the purpose of reaching their ultimate destination. The shipping order or receipt made out by the consignor and tendered by it to the Missouri Pacific Company with each shipment contained no express contract except as to the receipt of the shipment, and the law raised and imposed upon the Missouri Pacific Company a duty, on its part, only to transport the shipment to some point on its own line in the direction of ultimate destination of the shipment, and to there turn it over to a connecting carrier. The turning over of the shipment to defendant at Pueblo was not attended by the execution of any new contract, and the only implied contract that arose from the act of turning the shipment over and its receipt by defendant was the one raised by common law to transport to destination upon receipt of its charges for such transportation.

The Missouri Pacific Company, at the time all of the shipments involved herein were received by that company, had no authority for the making of a through

contract of shipment with respect to any of these shipments over the line of defendant.

The Brewing Company, which delivered all of these shipments to the Missouri Pacific Company as the initial carrier, did not seek or in any manner attempt to secure an express contract or bill of lading which would have been binding even upon the Missouri Pacific Company. It contended itself with a delivery to that company, with information as to the ultimate destination of the shipment. It knew, or must be conclusively presumed to have known, that there was no through route or joint rate between St. Louis and Leadville.

Again referring to the case of *Gulf, Colorado and Santa Fe R. Co. v. Texas*, *supra*, it will be noted that the shipment involved therein was an interstate shipment, characterized by all the indicia of such shipments; but the mere fact that it was interstate between Hudson, South Dakota, the point of origin, and Texarkana, Texas, was not controlling as to its subsequent movement so as to bring it under the operations of the Act to Regulate Commerce. It was clearly interstate commerce from the time of its origin at Hudson, South Dakota, until the time of its ultimate delivery at Goldthwaite, Texas; but after its original arrival at Texarkana it was no longer subject to the Act to Regulate Commerce, for the reason, as stated by the Supreme Court, that the original contract of shipment entered into at the time the shipment originated at Hudson was fully completed by its transportation to Texarkana.

In the case at bar the only transportation contracted for at the time and place of origin of the shipment was such transportation as the Missouri Pacific could furnish; namely, from St. Louis, Missouri, to

Pueblo, Colorado. Any contract for further transportation must be such as is raised by implication by the common law, or such as the Missouri Pacific was authorized to make; the Missouri Pacific Company was not authorized or empowered to make any contract with respect to these shipments beyond the terminus of its own line. Had defendant joined the Missouri Pacific Company in the establishment of a through route and joint rate, the Act to Regulate Commerce would have raised a contract in accordance with such tariff as might have been published and filed, covering such through route and joint rate; but no such action was taken, and there was no such through route or joint rate in existence at the time these shipments moved. If the acceptance by the Missouri Pacific Company of the aggregate of the freight charges from St. Louis to Leadville upon any of the shipments involved herein, obligated that company to see that such shipments were actually transported to Leadville, that is no concern of the defendant. It could, in so far as the jurisdiction of the Commission under the Act to Regulate Commerce is concerned, impose such conditions as it saw fit, and, however grievous such conditions may have been, the Missouri Pacific Company would have had no ground of complaint. The shipper has no legal grounds for complaint against the carrier with which it has no contract except by implication at common law.

When the shipments involved in this case reached Pueblo, any contract made by the Missouri Pacific Company, either expressly or by operation of law, or which the Missouri Pacific Company had authority to make, ended, and the subsequent movements of such shipments must have been and were in accordance with

new contracts entered into with the subsequent carrier or implied by the common law.

To again quote from the language of Mr. Justice Brewer, in the case of *Gulf, Colorado and Santa Fe R. Co. v. Texas*, *supra*:

“Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn was delivered to the Hardin Company at Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial, so far as the completed transportation was concerned.”

The Missouri Pacific Company, in delivering to defendant at Pueblo, in obedience to the instructions of the Brewing Company, if such instructions were given, or of its own motion, in the absence of instructions by the shipper, was “acting not as a carrier, but simply as a forwarder.” “Whatever may have been the thought or purpose” of the shipper or consignee “with respect to the further disposition” of the shipment involved “was a matter immaterial, so far as the completed transportation was concerned;” and the transportation of each of the shipments involved in this case, so far as the Missouri Pacific Company, or so far as any contract made or raised by implication of law by the delivery of the shipments involved in this case

to the Missouri Pacific Company by the Brewing Company, was concerned, ended at Pueblo.

Again, from the case last cited:

"The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goddthwaite, and that would be subject to the law of the state within which that carriage was to be made."

Such express or implied contract as existed between the Brewing Company and the Missouri Pacific Company was completed at Pueblo, and it was not obligatory upon defendant, except as the common law raised a duty upon its part to accept all shipments tendered to it as a common carrier for transportation over its lines, to receive or transport to destination on its lines a shipment tendered to it by the Missouri Pacific Company, and that upon such reasonable terms as this defendant might impose. The Act to Regulate Commerce did not and could not raise any new contract. Upon the arrival of the shipments involved in this case at Pueblo, it became incumbent upon either:

(1) The Missouri Pacific Company, if it actually contracted for a shipment to Leadville, to make a contract on its own account with defendant for the further transportation of each of such shipments from Pueblo to Leadville, and if it did so, either expressly or impliedly, it did so upon the basis of defendant's regularly and lawfully published rates of freight from Pueblo to Leadville, and the regulations of defendant with respect to the payment of freight upon such shipments; or

(2) The shipper or consignor to make a new contract for the carriage of each of such shipments from Pueblo to Leadville, or to accept such contract with respect thereto as was raised by the common law and the published intra-state tariffs of defendant, and such a contract "would be subject to the law of the state within which that carriage was to be made," and not subject to the Act to Regulate Commerce or to the authority or jurisdiction of the Interstate Commerce Commission thereunder. The fact that the shipments involved moved from one state across several intervening states to another state can make no difference whatever as to their subsequent transportation "wholly within one state," they not having originated in, nor being destined to, a foreign country, and cannot subject them to the operations of the Act to Regulate Commerce or to the jurisdiction of the Interstate Commerce Commission thereunder.

To again quote from Mr. Justice Brewer's opinion in the case last cited:

"In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract."

And, we might add, beyond that as to which the initial carrier had authority to contract.

There being no through route or joint rate in existence between the points over which these shipments

moved, the only contract which the Missouri Pacific Company had authority to make was to safely transport the shipments involved to the terminus of its own line in the direction of ultimate destination—to-wit, Pueblo, Colorado; and, having completed such shipment, then, "simply as a forwarder," "to deliver to some further carrier," and to pay such further carrier its charges for such further transportation in the event that it, the Missouri Pacific Company, had undertaken to receive from the shipper the aggregate of all freight charges from point of origin to ultimate destination. This contract the Missouri Pacific Company, as shown by the evidence, fully carried out, and in making delivery to defendant it simply designated on the expense bills, shipping orders or transfer sheets the ultimate destination of such shipments. It did not deliver to defendant a bill of lading, a contract, or even a waybill. It did not deliver a bill of lading or contract, because no bill of lading or formal contract had been entered into; and it did not deliver a waybill, because it could not make waybills upon such shipments where no through route or joint rate existed beyond the terminus of its own line. It did not and could not impose any conditions or obligations upon defendant other than its common-law obligations as a common carrier to receive and transport freight. Defendant had no knowledge of the assumption by it of any conditions or obligations other than its common-law obligations, and could not have such knowledge, because no such assumption could, as a matter of fact, or law, exist.

As suggested in the opening part of this argument, Congress has, by specific proviso, eliminated certain classes of traffic from the purview of the act, the shipments involved in this case were included in

the class or classes of traffic thus expressly eliminated from the purview and provisions of the statute. Such being the case, it necessarily follows that the Interstate Commerce Commission, which derives not only its authority and jurisdiction, but its very existence, from the Act to Regulate Commerce, had no jurisdiction whatever over defendant with respect to the shipments involved in this case.

The gist of the argument may be summarized as follows:

1. Congress could constitutionally make the act apply to all interstate commerce and commerce with foreign nations. *It did not do so.*

2. Within the meaning of the act, property may by a particular carrier be transported wholly within one state, although the origin of the traffic or its destination be entirely outside of the state in which such transportation takes place.

3. By express limitation, the act does not apply to transportation wholly within the state, unless the shipment originated in, or is destined to, a *foreign* country.

4. In the case at bar defendant's transportation and handling of the property was wholly within the State of Colorado.

5. The property so transported and handled was not shipped to or from a foreign country from or to any state or territory.

Therefore, the Act to Regulate Commerce does not apply to or control the acts of defendant as shown by the record, and the Interstate Commerce Commission was without jurisdiction in the premises.

The establishment of this proposition necessarily disposes of the entire controversy; for, if the Inter-

state Commerce Commission has no jurisdiction with respect to the shipments involved in the case, any order made by it in the premises must necessarily have been a nullity.

2. THE COMMISSION HAD NO POWER TO DEAL WITH DEFENDANT'S LOCAL RATE FROM PUEBLO TO LEADVILLE.

Plaintiff has contended that the Interstate Commerce Commission had no power to deal with defendant's rate from Pueblo to Leadville because that rate was a local rate and the Commission's jurisdiction was limited to consideration of the through or joint rate from St. Louis to Leadville. It was pointed out in this brief that the Commission did undertake to deal with defendant's local rate and it was assumed that the Commission had the power to fix that rate under the authorities cited. The defendant, however, does not concede that it was necessary in this case for the Commission to deal with defendant's local rate from Pueblo to Leadville, but has always contended, and does now contend, that if the Commission had any jurisdiction whatever it was the duty of the Commission, under the statute, to deal with the rate as a whole from St. Louis to Leadville. Defendant desires to call this Court's attention to certain arguments in support of that position, although it may be suggested that the argument is not strictly necessary in this case.

The complaint before the Commission challenged the reasonableness of the rates from St. Louis to Leadville, alleging that said rates and charges for the through transportation of beer were unjust and unreasonable, and praying that the Commission enter an order, "* * *

fixing a reasonable and just rate for the through transportation of beer in car load lots from said city of St. Louis to said city of Leadville" (fols. 10-11).

Upon that petition, the Commission ordered reparation out of the local rate from Pueblo to Leadville, but did not fix a rate.

The authority of the Interstate Commerce Commission to establish this rate rests entirely upon section 15 of the Act to regulate commerce, as amended by the Hepburn Act of June 29, 1906, which provides as follows:

"The Commission may also, after hearing on a complaint, establish through and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when they may be necessary to give effect to any provision of this act, and the carriers complained of have refused or neglected to establish such through routes and joint rates, provided no reasonable or satisfactory through route exists."

The method of effecting a division of rates referred to is a part of the same section providing that:

"Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearingw make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which or-

der shall take effect as a part of the original order."

When the Hepburn Act was passed in 1906, it had been settled that joint routes and rates were a matter of convention between the carriers, and that prior to the enactment of 1906, the Commission had no power to establish rates.

Therefore, the amendment of 1906 conferred on the Commission a new power which cannot be enlarged by intendment or doubtful interpretation. The power was conferred on the Commission, subject to plain limitations stated in the language of the amendment, which limitations are to be enforced and are "not to be trifled away."

Now, what is the power conferred upon the Commission by the amendment? It is (a) to "establish through and joint rates," and (b) to prescribe the division thereof in the manner specified.

A "thorough rate" is defined in Barnes on Interstate Transportation, section 80, to be "the rate applicable from the point of origin of a shipment to its destination."

And the same author, in the same section, defines a "joint rate" to be:

"Simply a through rate, every part of which has been made by express agreement between the carriers making the through rate."

It needs neither argument nor authority to sustain the proposition that the rates of defendant upon local traffic originating at Pueblo, Colorado, and destined to Leadville, Colorado, are beyond the jurisdiction of the Commission.

The Commission has no jurisdiction over the rate from Pueblo to Leadville, standing alone as a local rate, and no authority to award reparation on local shipments moving between Pueblo and Leadville, points within the same state.

The only possible jurisdiction which the Commission could have over any of defendant's rates between Pueblo and Leadville, is with respect to interstate traffic moving, in this case, from St. Louis to Leadville, not as a local rate, but as a portion of the rate covering the through transportation of the shipments from St. Louis, Missouri, to Leadville, Colorado.

The rate which plaintiff sought to draw in question before the Commission was the through rate alone. The shipper was only concerned with the through transportation and through rate as an entirety or unit. Therefore, the Commission should have dealt with it as a through rate only. The only authority of the Commission is to establish a through rate, and even though defendant may have been responsible for the entire overcharge as between it and the Missouri Pacific, nevertheless, the Commission should have dealt with the rate as a unit.

Moreover, the Commission had no power, in the first instance, to fix the division of such through rate. By the express language of the act, the Commission is empowered to fix the division in respect to joint or through rates established only when the carriers participating in the joint movement fail to agree among themselves upon the apportionment or division thereof; and, furthermore, the Commission could not do so by original order, but only by a supplemental order made after a hearing.

The Commission has no jurisdiction to make any order of reparation except at against all carriers participating in the movement of the shipments.

In the case at bar, the Commission dealt with only the local rate. It did not establish a unit through rate. It ordered reparation against defendant, payable out of its local rate.

The Commission should have made its order against both carriers, fixing the through rate. It should not undertake to apportion the division of such through rate until and unless the carriers failed to agree among themselves as to a proper division thereof. It should have fixed the future through rate but not the locals which together were to make up such rate. The matter of division should be left to the participating carriers for such adjustment between themselves as they deemed proper.

The Commission could not have made an order directly purporting to fix the divisions. Congress did not intend to confer upon the Commission power to do by indirection what it could not do directly.

Ry. v. Commission, 171 Fed. 680, 688.

The only section of the Hepburn Act that empowers the Commission to fix a rate is section 15. By that section its jurisdiction is specifically limited to the establishment of through and joint rates. The words "separately established rates" are employed in section 6. Their omission from the rate clause in section 15 is significant and evidences clearly an intent on the part of Congress not to include such rates in the power conferred.

The rates with which the Commission may deal are those "for the transportation of persons or property as defined in the first section of this act." The first section only deals with through and joint rates. Separately

established rates are not referred to in the first section.

The case of *Ry. v. Commission*, 195 Fed. 968, does not militate against these views. The only question raised in that case was the first question presented to this court and passed without decision in *Ry. v. Baer Bros.*, 187 Fed. 485, 488, to-wit, that the Commission had no jurisdiction over the rate or the transportation because the transportation was wholly within the State of Colorado, and that the Missouri Pacific had no authority to bind this plaintiff in error by a through contract or through bill of lading. All that the decision in 195 Fed. 968, holds is that the arrangements and exchanges between the Missouri Pacific Railway and the Denver and Rio Grande Railway were such that their mutual dealings with respect to the movements of this beer created conditions which, under the act, constituted a through route and through rate, and that, therefore, the Commission had the authority to investigate a rate made up in part of the Pueblo-Leadville rate. The question of the power of the Commission to reduce the Pueblo-Leadville rate as a unit, instead of reducing the entire through rate as a unit, was not raised, discussed or passed upon by the court.

Likewise, in the case of *Commission v. Ry.*, 218 U. S. 88, the only question discussed was the claim of the railroad that the rates were confiscatory, and also that the Commission in making them had done so for the purpose of artificially apportioning the country into zones tributary to trade centers, and that that was beyond the power of the Commission; those were the only contentions disposed of by the court. The question of the power of the Commission to deal with a local rate such as the one here involved was not discussed or passed upon by the court.

In conclusion defendant refers to the fact that there are numerous suggestions and some minor points contained in the argument of plaintiff upon which defendant has made no comment in this brief. It must not be assumed, however, that defendant concedes the correctness of any such arguments. The controlling phases of this case have received attention and for the sake of brevity non-essentials have not been argued.

For the reasons set forth herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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